Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner
Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh
40 Wall Street
New York, New York 10005

Table of Contents

PAGE

Opinion Below 1

Jurisdiction 2

Constitutional Provision and Statute Involved 2

Question Presented 2

Statement of the Case 3

Reasons for Granting the Writ 5

A. The Exercise of *In Personam* Jurisdiction by an Oklahoma Court over a Local New York Retailer and His New York Regional Distributor, Based Solely on Injury in Oklahoma as a Result of the Transient Presence in that State of the Retailer's New York Customer and the Product He Purchased in New York, Violates the Due Process Clause of the Fourteenth Amendment 5

1. Petitioners Did Not Avail Themselves of the Privilege of Conducting Activities in Oklahoma So As To Invoke the Benefit and Protection of the Laws of Oklahoma 5

2. Jurisdiction Cannot Be Constitutionally Sustained Solely on the Basis of the Foreseeability of a Possibility that a Purchaser Would Fortuitously Travel through Oklahoma and Be Involved in an Accident 6

B. The Highest Courts of Four Other States, When Presented with the Same Issue, Have Determined that the Exercise of *In Personam* Jurisdiction under the Circumstances of this Case Violates Due Process. Review in this Case Is Required for the Guidance of Both State Courts and Federal Courts in Diversity Cases 8

PAGE

C. The Decision of the Oklahoma Supreme Court Shatters All Remaining Restrictions on the Personal Jurisdiction of State Courts over Out of State Sellers and Subjects Such Sellers to Possible Suit in Any State Where Goods They Sell Fortuitously Appear 11

Conclusion 12

APPENDIX:

Opinion of the Supreme Court of the State of Oklahoma, filed October 10, 1978 ..... 1a

Table of Cases Cited

Erlanger Mills v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) 11

Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969) 7

Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972) 10

Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) 7

Hanson v. Denckla, 357 U.S. 235 (1958) 6, 7

Hutson v. Fehr Bros., Inc., 584 F.2d 833 (8th Cir. 1978) 7, 10

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 5, 11

Kulko v. Superior Court, 98 S.Ct. 1690 (1978) 6, 7

Oliver v. American Motors Corp., 70 Wash.2d 875, 425 P.2d 647 (1967) 8

Pellegrini v. Sachs & Sons, 522 P.2d 704 (Utah 1974) 9

Shaffer v. Heitner, 433 U.S. 186 (1977) 8

Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 438 P.2d 128 (1968) 9

Upgreen v. Executive Aviation Services, Inc., 304 F.Supp. 165 (D. Minn. 1969) 11

Constitutional Provision and Statutes Cited

PAGE

Oklahoma Statutes, title 12, section 1701.03(a)(4) ... 2, 4

United States Constitution, Fourteenth Amendment, section 1 2

28 U.S.C., section 1257(3) 2

Other Authorities Cited

Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. Ill. L.F. 533 8

Note, *Recent Developments—Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute,* 66 Colum. L. Rev. 199 (1966) 8

Note, *Developments in the Law, State-Court Jurisdiction,* 73 Harv. L. Rev. 909 (1960) 8

IN THE

Supreme Court of the United States

October Term, 1978

No.

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Opinion Below

The opinion of the Oklahoma Supreme Court, not yet reported, appears in the Appendix (1a-6a) to this petition. No opinion was rendered by the lower court, the District Court of Creek County, Oklahoma.

Jurisdiction

On October 10, 1978, the Oklahoma Supreme Court denied petitioners' application for a writ of prohibition and held that the State of Oklahoma may exercise *in personam* jurisdiction over petitioners in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision and Statute Involved

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution and the Oklahoma "long arm" statute.

Section 1 of the Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> "No State shall * * * deprive any person of life, liberty or property, without due process of law * * *."

The Oklahoma Statutes, tit. 12, § 1701.03, in pertinent part, provides:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:
>
> * * *
>
> (4) causing tortious injury in this state by an act or omission outside this state if he * * * derives substantial revenue from goods used or consumed or services rendered, in this state."

Question Presented

Whether the exercise by the State of Oklahoma of personal jurisdiction over a New York retailer and his New

York wholesale supplier is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution where (1) it is based solely on injury in Oklahoma resulting from the fortuitous transient presence in that state of the retailer's New York customer and the product he purchased in New York and (2) the retailer and the wholesaler neither engaged in any business, economic or other activity in, or directed toward, Oklahoma or Oklahoma residents, nor had any other relationship with Oklahoma or Oklahoma residents.

Statement of the Case

On December 15, 1976, Harry Robinson, a New York resident, purchased an Audi automobile from Seaway Volkswagen, Inc. ("Seaway"), his local Audi dealer in Massena, New York. In Spetember 1977, Mr. Robinson, accompanied by his wife and children, was travelling through Oklahoma, when his car collided with another vehicle. Claiming a defect in the car purchased in New York, the Robinsons initiated a products liability suit in Oklahoma against Seaway and Seaway's supplier, World-Wide Volkswagen Corporation ("World-Wide"), a New York wholesale distributor which sells Audi and other vehicles to local dealers in New York, New Jersey and Connecticut. Also sued were Volkswagen of America, Inc., the importer of the vehicle, and Audi N.S.U. Auto Union Aktiengesellschaft, the German manufacturer of the car.

Neither Seaway nor World-Wide has ever done any business in Oklahoma and neither has ever derived any revenue from economic activities related to Oklahoma. The business activities of Seaway and World-Wide are, by their very nature, confined to their local areas. They do not advertise their products in any national magazine or on any

television or radio network and they do not participate in any advertising fund or pool placing advertisements in or which reach Oklahoma. Oklahoma is simply outside the economic sphere in which Seaway and World-Wide operate.

Completely lacking contacts with Oklahoma, Seaway and World-Wide moved to dismiss the Robinsons' action on the ground that the assumption of jurisdiction over them by the State of Oklahoma in this case would violate the Due Process Clause of the Fourteenth Amendment. Following a denial of their motion by the Oklahoma District Court, Seaway and World-Wide petitioned the Oklahoma Supreme Court for a writ of prohibition to restrain the district court judge, the Hon. Charles S. Woodson, from exercising jurisdiction, again contending that the Due Process Clause precluded Oklahoma from subjecting them to its jurisdiction.*

On October 10, 1978, the Oklahoma Supreme Court denied the writ of prohibition, concluding that personal jurisdiction over petitioners could be exercised under the Oklahoma "long arm" statute, because each of the petitioners "derives substantial revenue from goods used * * * in this State." Okla. Stat., tit. 12, § 1701.03(a)(4). From the use by the Robinsons of their car in Oklahoma, the court believed it was "reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma." (6a).

* Paragraph 11 of petitioners' Application To Assume Original Jurisdiction and Petition for a Writ of Prohibition reads as follows: "Petitioners state that the Respondent Judge is attempting to exercise jurisdiction over these petitioners, even though they do not satisfy the criterion of having any minimal contacts with the State of Oklahoma, and for the respondent Judge to continue to issue orders and exercise jurisdiction over these petitioners is a substantial violation of the due process clause of the Fourteenth Amendment of the United States Constitution, and contrary to the laws of the State of Oklahoma."

Although the opinion recognizes that a determination of long-arm jurisdiction necessitates an inquiry into "whether such exercise of jurisdiction is consistent with the constitutional requirements of due process" (2a), as well as an analysis of state statutory provisions, the opinion never specifically comments on its conclusions with respect to this threshold inquiry. Apparently, the court felt that the constitutional requirements were satisfied by the fact that "the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can forsee its possible use in Oklahoma." (6a).

Reasons for Granting the Writ

A. The Exercise of *In Personam* Jurisdiction by an Oklahoma Court over a Local New York Retailer and his New York Regional Distributor, Based Solely on Injury in Oklahoma as a Result of the Transient Presence in that State of the Retailer's New York Customer and the Product He Purchased in New York, Violates the Due Process Clause of the Fourteenth Amendment.

1. Petitioners Did Not Avail Themselves of the Privilege of Conducting Activities in Oklahoma So As To Invoke the Benefit and Protection of the Laws of Oklahoma.

Before a person can become subject to *in personam* jurisdiction, he must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protec-

tions of its laws." *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958); *Kulko* v. *Superior Court,* 98 S.Ct. 1690, 1698 (1978).

This essential element is completely absent in this case.

Neither Seaway nor World-Wide marketed its automobiles in Oklahoma and neither aimed its selling efforts toward Oklahoma residents. Seaway's sales of automobiles were confined to a localized market in Massena, New York. World-Wide's sales of automobiles were limited to local dealers in New York, New Jersey and Connecticut. Petitioners did not receive any economic benefit from the Oklahoma market and consequently did not enjoy any protection of Oklahoma laws. That the accident occurred in Oklahoma was a fortuitous event precipitated by the unilateral, voluntary act of the Robinsons in driving through that state. The Robinsons' post-sale decision to travel through Oklahoma did not result in any monetary or other benefit to Seaway or World-Wide.

Where, as here, there is not even the remotest activity directed to the exploitation of a market in the forum state, and no economic gain by reason of any purposeful activity in that state, *in personam* jurisdiction cannot be constitutionally sustained. To require Seaway and World-Wide to defend in Oklahoma in the absence of such activities is both unfair and unreasonable.

2. Jurisdiction Cannot Be Constitutionally Sustained Solely on the Basis of the Foreseeability of a Possibility that a Purchaser Would Fortuitously Travel through Oklahoma and Be Involved in an Accident.

The finding of the Oklahoma Supreme Court that an Oklahoma accident was a foreseeable consequence of the New York sale by Seaway is a constitutionally impermissible basis for assuming jurisdiction over petitioners.

Without more, foreseeability is not constitutionally equivalent to the fairness test of *International Shoe.*

It is within the realm of foreseeable possibility that a New York purchaser of an automobile from a New York dealer may, one day, travel in that car to another state. Indeed, it is foreseeable that any purchaser of any consumer product may take that product out of the state of purchase. If foreseeability alone were sufficient, then every local seller would become subject to the jurisdiction of every state in which the product he sold happens to be brought by the purchaser.

Foreseeability must be coupled with the requisite "affiliating circumstances" before it is reasonable and fair for a state to subject a person to its jurisdiction. *Hanson* v. *Denckla, supra,* 357 U.S. at 246; *Kulko* v. *Superior Court, supra,* 98 S.Ct. at 1697. These affiliating circumstances are present only where the seller purposefully availed himself of the benefits of the forum state, either through sales in that state or intentional efforts to reach that state's market and generate revenue from sales to its residents.

This case does not concern a manufacturer whose sales or advertising are national in scope. Such a seller might be said to anticipate that his products would enter each state toward which he directed his selling effort and from which he seeks to gain significant economic benefits as a result of his purposeful activities aimed at customers in the state. *See, Eyerly Aircraft Co.* v. *Killian,* 414 F.2d 591 (5th Cir. 1969); *Gray* v. *American Radiator and Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961). *cf. Hutson* v. *Fehr Bros., Inc.,* 584 F.2d 833 (8th Cir. 1978). However, where, as here, those circumstances are totally absent, and the forum state is not the focus or target of any purposeful acts by the seller, it becomes unfair and unreasonable, in the

context of our federal system of government, for the seller to be called upon to defend in the forum state.*

B. The Highest Courts of Four Other States, When Presented with the Same Issue, Have Determined that the Exercise of *In Personam* Jurisdiction under the Circumstances of this Case Violates Due Process. Review in this Case Is Required For the Guidance of Both State Courts and Federal Courts in Diversity Cases.

Oliver v. *American Motors Corp.*, 70 Wash.2d 875, 425 P.2d 647 (1967), was a case where, plaintiff, a resident of Oregon, purchased a vehicle from an Oregon dealer. Subsequently, he went on a pleasure trip to the state of Washington, where he was overcome by gaseous fumes emanating from a defective exhaust system. Apart from being the place of the accident. Washington had no relation to the dealer or the purchaser. Under these circumstances, the Supreme Court of Washington held that the exercise of long-arm jurisdiction was unconstitutional, because no inference of minimal contacts with the state was warranted

> "where there is a sale by an out-of-state retailer to his local customer, if nothing further appears by way of a purposeful act on his part or possession of information, which would in any way charge the retailer with knowledge that his transaction might have out-of-state consequences. To attach personal jurisdiction because thereafter the out-of-state purchaser brings the offending mechanism into this state and a tortious consequence occurs is so slender and tenuous a thread on which to hang the implication of submission to our jurisdiction, that in our judgment it does indeed offend 'traditional notions of fair play and substantial justice' within the contemplation of the due process clause." 70 Wash.2d at 889, 425 P.2d at 656.

* *See*, Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533; Note, *Recent Developments—Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute*, 66 Colum. L.R. 199, 206-208 (1966); Note, *Developments in the Law, State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 928-930 (1953). *cf. Shaffer* v. *Heitner*, 433 U.S. 186, 203-204 (1977).

In *Pellegrini* v. *Sachs & Sons*, 522 P.2d 704 (Utah 1974), the plaintiff, a California resident, purchased an automobile from a local California dealer. After moving to Utah, the purchaser was involved in a collision in that state. The exercise of long-arm jurisdiction by Utah over the California dealer was held unconstitutional.

> "Differing from the manufacturer, a dealer * * * has little or no interest in the sale of similar products in the foreign state. While it is true that he may reasonably expect that the car will go into other states, that does not seem overly important. The counterpoint is that it is also to be expected that most of the products he sells will be used where he is (in California) most of the time; and that even if one does leave, it will likely return, so that in the great preponderance of instances, the discharge of his duties as to the product will be where he is. It is more significant to note that he does not go into the foreign state to take advantage of its business climate or the protection of its laws." 522 P.2d at 707.

Again in *Tilley* v. *Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968), the court refused, on constitutional grounds, to permit jurisdiction over an out-of-state truck dealer who sold the vehicle in Colorado and had no relationship to Kansas, where the accident occurred.

> "[T]here must be something more in 'product hazard' cases than a foreseeable injury from the product to fulfill the minimum contact requirement of due process. If the defendant advertises, solicits or sells its product in the forum state it then has or can anticipate some direct or indirect financial benefit from the sale, trade, use or servicing of its products in the

> forum state. It is then subject to *in personam* jurisdiction. The particular product or service causing the injury need not be sold or performed in the forum state but the defendant must reasonably have or anticipate financial benefit from the sale, trade, use or servicing of its products in the forum state." 200 Kan. at 648, 438 P.2d at 133-134.

In the absence of such advertisement, solicitation or sale, the mere presence of the vehicle in the forum state could not be equated with the derivation of financial benefits from the forum, and jurisdiction could not be sustained. 200 Kan. at 649-650, 438 P.2d at 134.

Similarly, the Supreme Court of Colorado, in *Granite States Volkswagen, Inc.* v. *District Court,* 177 Colo. 42, 492 P.2d 624 (1972), refused, on constitutional grounds, to exercise long-arm jurisdiction over a New Hampshire dealer who sold a car in New Hampshire to a person who subsequently moved to and had an accident in Colorado. Without a showing of any "voluntary action calculated to have an effect" in Colorado, there was no basis for *in personam* jurisdiction over the dealer in Colorado. 177 Colo. at 45, 492 P.2d at 625-626.

The highest courts of the states of Washington, Utah, Kansas and Colorado, on facts virtually identical to those in this case, have thus held that the jurisdiction sustained by the supreme court of Oklahoma in this case is constitutionally impermissible. To permit the Oklahoma decision to remain standing will undoubtedly tend to breed confusion, not only for the courts of other states, but for the federal district and appellate courts as well, which are becoming increasingly involved in product liability diversity cases and are being called upon to determine the permissible scope of state long-arm jurisdiction, often as a matter of first impression. *See, e.g., Hutson* v. *Fehr Bros, Inc., supra,* 584 F.2d 833. A review by this Court is required to provide guidance for the courts which will inevitably be faced in the future with the question raised here.

C. The Decision of the Oklahoma Supreme Court Shatters All Remaining Restrictions on the Personal Jurisdiction of State Courts over Out of State Sellers and Subjects Such Sellers to Possible Suit in Any State Where Goods They Sell Fortuitously Appear.

Petitioners have "no contacts, ties, or relations" (*International Shoe* v. *Washington, supra,* 326 U.S. at 319), with the state of Oklahoma. Application of the Oklahoma long arm statute to Seaway and World-Wide extends state court jurisdiction beyond the constitutional limit and removes any remaining barriers to inhibit Oklahoma, or any state following its example, from exercising *in personam* jurisdiction over any seller whose sole connection with the forum state is the fortuitous circumstance of the product's presence in that state.

Under such a *per se* rule of amenability to suit, every automobile dealer, every retail seller of tires* and, indeed, every retailer or local distributor of consumer products of every nature would be required to defend a suit wherever his products may become involved in an accident.** This would be so despite the complete lack of any contact with the forum state, and the total absence of any economic benefit gained from purposeful activity directed toward the forum state.

---

* The burdens imposed upon a local tire retailer who would be amenable to suit in any state where his customer happened to be involved in an accident attributable to the tire is the subject of Judge Sobeloff's often cited hypothetical in *Erlanger Mills* v. *Conoes Fibre Mills, Inc.,* 239 F.2d 502, 507 (4th Cir. 1956).

** *See, Upgreen* v. *Executive Aviation Services, Inc.,* 304 F.Supp. 165, 170-171 (D. Minn. 1969), where the court postulates the possible requirement of a roadside seller of soft drinks in Florida defending a suit in Alaska simply because the Alaskan purchaser bought the bottle in Florida, returned to his home state and gave it to his child, who drank its contents and became ill. Here, where the purchaser was not even a resident of the forum state, the inequity of such a result is even greater.

Conclusion

For all the reasons set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner
Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK,
GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh
40 Wall Street
New York, New York 10005

Appendix

Opinion of the Supreme Court of the State of Oklahoma

No. 52,478

October 10, 1978

—o—

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

vs.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

—o—

ORIGINAL PROCEEDING ON APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

* * *

BARNES, J.:

This case concerns an original action brought on behalf of World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., in which the petitioners ask this Court to assume original jurisdiction and issue a writ of prohibition, prohibiting the respondent trial judge, the Honorable Charles S. Woodson, from exercising personal jurisdiction over the petitioners, through service under the Uniform Interstate and International Procedure Act, as adopted in Oklahoma at 12 O.S. 1971, §§ 1701.01 et seq., commonly referred to as the Oklahoma Long-Arm Statute.

The test for applying Long-Arm jurisdiction in Oklahoma is to determine whether the exercise of jurisdiction is authorized by statute, and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process.[1]

After examining Oklahoma's Long-Arm Statute and the facts present in this case, we conclude that jurisdiction over the non-resident petitioners is authorized by statute.

The facts before us in this case are as follows: In September of 1977, an Audi automobile, driven by Kay Eloise Robinson, was struck in the rear by an automobile being driven by a party not involved in the case before us. Mrs. Robinson and her two children, Eva May and George Samuel, were seriously injured in that collision when the gasoline tank of their Audi automobile ruptured, causing a fire in the passenger compartment of that car. As a result of that collision, manufacturers products liability actions were brought on behalf of Mrs. Robinson, her husband and her children against (1) the manufacturer of the automobile, Volkswagenwerk Aktiengesellschaft; (2) against the U.S. importer of the automobile, Volkswagen of America, Inc.; (3) against the distributor of the automobile, World-Wide Volkswagen Corporation; and (4) against the retail dealer who sold the Robinsons the car, Seaway Volkswagen, Inc.

It is World-Wide Volkswagen, distributor of Audis in Connecticut, New York and New Jersey, and Seaway Volkswagen, Inc., the dealer who sold the car, that petition this Court seeking a writ of prohibition.

In Oklahoma, jurisdiction over nonresident defendants cannot be inferred, but must affirmatively appear from the

[1] See *Timberlake* v. *Summers*, 413 Fed. Supp. 708 (D. C. Okla. 1976).

record.[2] When a jurisdictional question arises, the burden of proof is upon the party asserting that jurisdiction exists.[3]

In the case before us, the respondents contend that the courts of Oklahoma have jurisdiction over the petitioners because they caused a tortious injury in this State, giving rise to jurisdiction under the provisions of 12 O.S. 1971, § 1701.03(a) (3) or (4).

Title 12 O.S. 1971, § 1701.03, provides in part:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:
>
> "(1) • • •
>
> "(2) • • •
>
> "(3) causing tortious injury in this state *by an act or omission in this state;*
>
> "(4) causing tortious injury in this state *by an act or omission outside* this state *if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;* • • •." (Emphasis added)

While it is true that the alleged acts or omissions of the petitioners allegedly caused tortious injury in this State, none of the acts or omissions alleged took place in this State. The defects in the product allegedly existed at the time the product left the hands of the petitioners, and at that time the automobile was not, and had not been, in

[2] *Roberts* v. *Jack Richards Aircraft Co.*, 536 P.2d 353 (Okl. 1975), and *Crescent Corp.* v. *Martin*, 443 P.2d 111 (Okl. 1968).

[3] *Roberts* v. *Jack Richards Aircraft Co.*, 536 P.2d 353 (Okl. 1975).

the State of Oklahoma. We therefore conclude that no acts or omissions on the part of the petitioners took place within the State. In attempting to convince us that acts or omissions of the petitioners did take place within the State, the respondents rely upon *Gray* v. *American Radiator & Standard Sanitary Corp.*, 176 N.E.2d (Ill. 1961).

We do not find the analysis used in *Gray* v. *American Radiator, supra,* persuasive. In that case, the Illinois Supreme Court was interpreting a provision of the Illinois Revised Statutes which provided that a nonresident, who either in person or through an agent *commits a tortious act within Illinois,* submits to the jurisdiction of Illinois, and may be served by means of the State Long-Arm Statute. In determining whether the manufacturer of a defective safety valve, which was allegedly defective at the time of manufacture in Ohio, committed a "tortious act" in the State of Illinois, the Court held that a tort had been committed within the jurisdiction because the injury which resulted from the defect occurred in Illinois. In so ruling, the Court held that the place of a wrong is where the last event necessary to render the actor liable takes place, and that the last act to render the manufacturer liable was the sustaining of an injury in Illinois by the plaintiff.

Our statute is *unlike* the Illinois statute. The Illinois statute merely requires that a tortious act be committed within Illinois. The Illinois court ruling makes a party subject to Illinois jurisdiction if his acts ultimately result in tortious injury within Illinois. Our statute requires more than the occurrence of tortious injury within the State before a party is subject to personal jurisdiction. Under the provisions of subsection (a) (3) of 12 O.S. 1971, § 1701.03, a person is subject to personal jurisdiction in Oklahoma if he causes tortious injury in the State "by an act or omission in this State." It is not possible to interpret the provisions of subsection (a) (3) of Section 1701.03 in the same way in which Illinois interpreted its statute, as such an interpretation would be inconsistent with subsection (a) (4) of the same section, which specifically sets forth the prerequisites for in personam jurisdiction in situations in which tortious injury in this State is caused by acts or omissions outside the State.

If we were to follow Illinois' rationale, and hold that the mere occurrence of a tortious injury in this State constituted an act or omission in the State, there would be, under that interpretation, no such thing as tortious injury within the State *caused by acts or omissions outside the State.* Such an interpretation would be totally inconsistent with the provisions of subsection (a) (4), which specifically deal with situations in which tortious injury within the State is caused by acts or omissions outside the State. That subsection provides that in such situations, particular contacts with the State are necessary in order to confer jurisdiction over out-of-State tort feasors.

Because our statute required more contact with the State than the Illinois statute, we are not persuaded by the Illinois court's rationale in *Gray* v. *American Radiator, supra.* Accordingly, we hold that the acts or omissions of the petitioners, which are alleged in the petition, were not acts or omissions in this State, and therefore no power to exercise personal jurisdiction over the petitioners existed by virtue of the provisions of 12 O.S. 1971, § 1701.03 (a)(3).

We next consider whether the power to exercise personal jurisdiction over the petitioners existed by virtue of 12 O.S. 1971, § 1701.03(a)(4). Under the provisions of subsection (a)(4) of 12 O.S. 1971, § 1701.03, more is required than the mere occurrence of tortious injury in this State. Under the provisions of that subsection, a party causing tortious injury in this State by acts or omissions outside the State is subject to the exercise of personal jurisdiction of this State, if *"he regularly does or solicits business or engages in any*

other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.''

In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State.

Because the trial court was justified in concluding that the petitioners derived substantial revenue from goods used within the State, and because alleged acts or omissions on the part of petitioners outside the State allegedly caused tortious injury in this State, we hold that the trial court had the power, pursuant to 12 O.S. 1971, § 1701.03(a)(4), to exercise personal jurisdiction over the petitioners. As the trial court had such power, we refuse to issue a writ of prohibition.

ORIGINAL JURISDICTION ASSUMED AND ORIGINAL PROHIBITION DENIED.

HODGES, C. J., LAVENDER, V. C. J., and WILLIAMS and DOOLIN, JJ., concur.

BERRY and SIMMS, JJ., concur in result.

IRWIN, J., concurs in part and dissents in part.

RECEIVED
APR 5 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPENDIX

IN THE

Supreme Court Of The United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,
Petitioners,

V.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, Harry Robinson, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, Harry Robinson, and HARRY ROBINSON, individually,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED JANUARY 5, 1979
CERTIORARI GRANTED FEBRUARY 21, 1979

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION
and SEAWAY VOLKSWAGEN, INC.,
Petitioners,

V.

THE HONORABLE CHARLES S. WOODSON,
District Judge of Creek County, State of Oklahoma,
KAY ELOISE ROBINSON, EVA MAY ROBINSON,
a minor, by and through her father and next friend,
Harry Robinson, GEORGE SAMUEL ROBINSON,
a minor, by and through his father and next friend,
Harry Robinson, and HARRY ROBINSON, individually,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX

Page

Chronological List of Relevant Docket Entries 1

Amended Petition of Plaintiff Kay Eloise Robinson, Filed May 23, 1978 2

Page

Defendant World-Wide Volkswagen Corporation's Special Appearance, Denial of Jurisdiction and Venue, Filed November 17, 1977 9

Defendant Seaway Volkswagen, Inc.'s Special Appearance and Denial of Jurisdiction, Filed November 17, 1977 11

Order Overruling Motions to Quash and Plea to the Jurisdiction, Filed January 2, 1978 13

Defendant World-Wide Volkswagen Corporation's Motion to Reconsider, Filed January 5, 1978 15

Defendant Seaway Volkswagen, Inc.'s Motion to Reconsider, Filed January 5, 1978 17

Order Overruling Motions to Reconsider, Filed June 14, 1978 20

Second Amended Petition of Plaintiff Kay Eloise Robinson, Filed June 14, 1978 22

Application of Petitioners World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc. to the Supreme Court of the State of Oklahoma to Assume Original Jurisdiction and Petition for Writ of Prohibition, Filed June 29, 1978 29

Order Denying Writ of Prohibition, Filed October 10, 1978 (notation only) 35

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

11/17/77 Defendant World-Wide Volkswagen Corporation's Special Appearance, Denial of Jurisdiction and Venue filed in Creek County, Oklahoma District Court

11/17/77 Defendant Seaway Volkswagen, Inc.'s Special Appearance and Denial of Jursidiction

12/21/77 Order Overruling Motions to Quash and Plea to the Jurisdiction

1/5/78 Defendant World-Wide Volkswagen Corporation's Motion to Reconsider Order of December, 1977

1/5/78 Defendant Seaway Volkswagen, Inc.'s Motion to Reconsider Order of December 21, 1977

5/23/78 Amended Petition of Plaintiff Kay Eloise Robinson, Filed in Creek County, Oklahoma District Court

6/14/78 Order Overruling Motions to Reconsider

6/14/78 Second Amended Petition of Plaintiff Kay Eloise Robinson, Filed in Creek County, Oklahoma District Court

6/29/78 Petitioners World-Wide Volkswagen Corporation's and Seaway Volkswagen, Inc.'s Application to Assume Original Jurisdiction and Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma

10/10/78 Order and Opinion of the Supreme Court of Oklahoma Denying Writ of Prohibition (Reprinted in full as Appendix in Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma, Filed herein on January 5, 1979)

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
STATE OF OKLAHOMA

No. C 77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

Attorney's Lien Claimed

Filed May 23, 1978

AMENDED PETITION

COMES now the plaintiff, KAY ELOISE ROBINSON, and for cause of action against the defendants, alleges and states as follows: Plaintiff adopts the allegations of her petition and all prior Amendments to Petition.

I.

Plaintiff alleges that at all material times mentioned herein, she was a resident of the State of New York.

II.

The defendant, Volkswagenwerk Aktiengesellschaft, hereinafter known as Volkswagen of Germany (VWAG), is a foreign corporation organized and existing under the laws of Germany. They manufacture Audi automobiles. They are doing business within the State of Oklahoma, although they have not appointed a service agent upon whom service of process can be had.

III.

The defendant, Volkswagen of America, Inc., hereinafter known as Volkswagen of America (VWA), is a foreign corporation organized under the laws of the State of New Jersey, and they are the exclusive importers of Audi automobiles for the entire United States of America. They are a wholly owned subsidiary of (VWAG).

IV.

The defendant, World-Wide Volkswagen Corporation, is a foreign corporation existing under the laws of the State of New York, and they are exclusive distributors for Audi automobiles for the States of Connecticut, New York and New Jersey.

V.

The defendant, Seaway Volkswagen, Inc., is a foreign corporation existing under the laws of the State of New York, and they are retail automobile dealers for Audi automobiles in Messena, New York.

VI.

Plaintiff, Kay Eloise Robinson, alleges that at all material times mentioned herein, she and the said Harry Robinson were husband and wife, and they are the natural parents of George Samuel Robinson and Eva Mae Robinson.

VII.

(a) Plaintiff alleges that on September 21, 1977, at about 9:15 P.M., she was driving a 1976 Audi automobile, belonging to plaintiff and to her husband, Harry Robinson, westward on the Turner Turnpike within Creek County, Oklahoma, at a point approximately one mile east of the Sapulpa, Oklahoma exit. The plaintiff's minor children, George Samuel Robinson and Eva Mae Robinson, were riding as passengers in the 1976 Audi automobile, then being driven by this plaintiff.

(b) Plaintiff alleges that at the same time and place, another motorist named Lloyd Albert Hull was driving his 1971 Ford automobile in a westerly direction behind the said 1976 Audi automobile, which was being driven by plaintiff, and that the said Lloyd Albert Hull did suddenly thereupon drive his vehicle into and upon the rear of the 1976 Audi automobile being driven by plaintiff, so as to cause the gas tank on the Audi automobile to rupture and the said Audi automobile to erupt in flames; thereby inflicting severe, crippling, painful, permanent and disabling injuries upon this plaintiff and her minor children.

VIII.

Plaintiff alleges that prior to September 21, 1977, the date of the aforementioned accident, the defendant (VWAG) designed, made, manufactured, sold, and placed in the stream of interstate commerce a 1976 Audi 100 LS automobile, Serial No. 8161018849. The defendant (VWAG) sold said Audi automobile to defendant (VWA), who imported it into the United States of America. The defendant (VWA) in turn sold said Audi automobile to defendant, World-Wide Volkswagen Corporation, who in turn sold said Audi Automobile to Seaway Volkswagen, Inc. Seaway Volkswagen, Inc. later sold said Audi automobile to plaintiff, Kay Robinson, and Harry Robinson on December 15, 1976.

IX.

Plaintiff alleges that all the defendants, at all times material herein, occupied the position and status of the manufacturer of the said Audi automobile involved herein. That as manufacturers, sellers, and distributors of the said Audi automobiles, they advertised the Audi automobile in national magazines which were circulated in Oklahoma. They advertised Audi automobiles on national television, which was broadcast and shown throughout the State of Oklahoma. They manufactured, sold, and distributed the

defective and unreasonably dangerous Audi automobile to plaintiff which directly and proximately resulted in injury and damages to this plaintiff in the State of Oklahoma. They could reasonably anticipate that the said Audi automobile would be used upon the highways of the State of Oklahoma. None of the defendants maintain a service agent within the State of Oklahoma, upon whom service of process can be served.

X.

(a) Plaintiff alleges that the aforementioned Audi automobile, as manufactured and at the time the aforementioned Audi automobile left the possession of each of the defendants, was defective, unsafe and unfit for its intended use as a passenger automobile, and it was unreasonably dangerous in that it was so designed and constructed so that its gas tank was subject to rupture and explosion upon a mild impact from the rear by another vehicle.

(b) Plaintiff alleges that the Audi automobile was further defective in that it was so designed and constructed that there was no fire wall between the passenger compartment and the fuel supply or gas tank location so that upon a slight impact from the rear the gas tank was subject to rupture and explosion; whereby, a gasoline fire could easily spread into the passenger compartment with forseeable and resulting harm to the passengers.

(c) Plaintiff further alleges that the Audi automobile was further defective in that the doors would jam shut upon slight impact from the rear.

(d) Plaintiff further alleges that the Audi automobile was further defective in that it contained no safety features in the electrical system so as to prevent ignition upon impact.

(e) Plaintiff further alleges that the Audi automobile was further defective in that it contained no self-sealing device on the fuel tank.

(f) Plaintiff further alleges that the Audi automobile was further defective in that the cap on the fuel tank, as well as the spout on the fuel tank, were subject to rupture and separation upon slight impact from the rear.

XI.

Plaintiff alleges that the defective, unsafe, unfit, and unreasonably dangerous condition of the aforementioned Audi automobile was a substantial producing factor in causing plaintiff's injuries and damages and the manufacture, sale and distribution of the said Audi automobile, in its defective and unreasonably dangerous condition, was a direct, proximate and producing cause of plaintiff's injuries and damages.

XII.

Plaintiff alleges that as a direct and proximate result of the defective, unsafe, unfit, and unreasonably dangerous condition of the aforementioned Audi automobile, and the manufacture, sale and distribution thereof, she suffered the following injuries, to-wit:

1. Third degree burns over her upper body and torso.
2. Injury to her eyes.
3. Severe scarring and mutilation of her entire body.
4. Severe physical and emotional shock.
5. Loss of portions of both hands.
6. Other injuries not yet determined, but which will be pleaded later by amendment.

XIII.

Plaintiff alleges that the defendants well knew that the placement of the fuel tank in the 1976 Audi automobile was in a position where it was particularly susceptible to collision, resulting fire and to mutilating injuries to passengers. Likewise, they were aware of the dangers from the defective design and placement of the fuel spout and fuel cap and lack of fire wall in said Audi automobile.

The defendants were well aware of the dangers to users of said Audi automobile and were fully aware of safety features which were available and which could easily have been included in the 1976 Audi automobile and which would have prevented plaintiff's injuries, but the defendants willfully, wantonly, deliberately, and knowingly chose to ignore these safety features, in favor of a cost saving, and chose to make, manufacture, sell and distribute said Audi automobile in its defective and unreasonably dangerous condition while well knowing that harm would result to users of said Audi automobile.

The defendants deliberately sacrificed safety for a cost saving while ignoring the known dangers to passengers, such as plaintiff, from the usual placement of the fuel tank in the rear of the 1976 Audi automobile. Defendants acted with a total utter and reckless disregard for the rights of prospective passengers and users, including this plaintiff, and displayed a willful, wanton, and malicious manner in total disregard for the rights of this plaintiff; because of this, plaintiff should recover punitive damages in the amount of Two Million Dollars ($2,000,000.00), for the purpose of deterring defendants and others from like or similar conduct in the future.

XIV.

Plaintiff alleges that following her aforementioned injuries, she has suffered and will continue to suffer severe and excrutiating pain, both physical and mental. Her injuries are serious and permanent in nature, and she has suffered permanent physical impairment. She has been permanently scarred, mutilated and disfigured. Her capacity to earn a living has been seriously and permanently impaired. She has suffered a loss of future earnings of Two Hundred Thousand Dollars ($200,000.00).

XV.

Plaintiff alleges that on the date of the aforementioned

accident, she was a healthy, able-bodied woman 35 years of age, and had a life expectancy of 42.5 years, according to the Life Tables of the United States Life Tables of the Department of Health, Education and Welfare.

XVI.

Plaintiff alleges that by reason of all the foregoing, she has suffered a loss in actual damages of Two Million Seven Hundred Thousand Dollars ($2,700,000.00), and she is entitled to exemplary damages of Two Million Dollars ($2,000,000.00), for all of which she claims damages against the defendants.

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, for the sum of Two Million Seven Hundred Thousand Dollars ($2,700,000.00), actual damages and judgment for exemplary damages in the sum of Two Million Dollars ($2,000,000.00), or a total judgment of Four Million Seven Hundred Thousand Dollars ($4,700,000.00), together with her costs and for all other legal and equitable relief to which she may be entitled.

JURY TRIAL DEMANDED

GREER AND GREER
By Jefferson G. Greer
Attorneys for Plaintiff
206 Beacon Building
Tulsa, Oklahoma 74103
(918) 584-3591

Mr. Charles A. Whitebook
Attorney at Law
1700 Fourth NBT Building
Tulsa, Oklahoma 74119
(918) 583-2626

Permission granted this ____ day of May, 1978, to file this Amended Petition.

/S/ Charles S. Woodson
Judge of the District Court

[Certificate of Mailing omitted]

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLDWIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

Filed November 17, 1977

SPECIAL APPEARANCE,
DENIAL OF JURISDICTION AND VENUE

COMES NOW the defendant Worldwide Volkswagen Corporation, and hereby specially appears for the purpose of objection to jurisdiction and venue only in this cause upon the following grounds and reasons:

1. Defendant Worldwide Volkswagen Corporation is a foreign corporation, it is not authorized to do business in Oklahoma nor has it ever done business in Oklahoma, and it has never had any type of contact, or minimal contact with the jurisdiction of the State of Oklahoma.
2. The statutes of the State of Oklahoma and of the United States Constitution provide that in personam jurisdiction cannot be effected within the boundaries of the State of Oklahoma upon this defendant.
3. This Honorable Court does not have jurisdiction over the parties, nor venue of the subject matter.

4. Service of process has not been issued, executed, nor returned according to the statutes of the State of Oklahoma.

Defendant Worldwide Volkswagen Corporation further requests and respectfully asks this Honorable Court to set the issues of jurisdiction and venue for a hearing pursuant to Oklahoma Statutes Title 12, Section 189, so that this defendant can submit evidence to support this defendant's Special Appearance before the Court.

WHEREFORE, defendant Worldwide Volkswagen Corporation prays for an immediate hearing concerning the jurisdiction and venue of this Court, and further prays for a dismissal of the action commenced herein upon the grounds and reasons heretofore stated concerning the Court's total lack of jurisdiction of the parties, subject matter and venue hereto.

Authorities:
United States Constitution, 14th Amendment
Due Process Clause
Oklahoma Statutes, Title 12, Section 137
Oklahoma Statutes, Title 12, Section 163
Oklahoma Statutes, Title 12, Section 170.1
Oklahoma Statutes, Title 12, Section 170.8
Oklahoma Statutes, Title 12, Section 187
Oklahoma Statutes, Title 12, Section 189
Oklahoma Statutes, Title 12, Section 1701.02
Oklahoma Statutes, Title 12, Section 1701.03
Oklahoma Statutes, Title 12, Section 1702.01
Oklahoma Statutes, Title 18, Section 471

/S/ Mike Barkley
Suite 702 Utica Tower
1924 South Utica
Tulsa, Oklahoma 74104
Telephone: (918) 749-8846

Attorney for Defendant
Worldwide Volkswagen Corporation

[Notarization and Certificate Of Mailing omitted]

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

Filed November 17, 1977

SPECIAL APPEARANCE AND DENIAL OF JURISDICTION

The defendant, Seaway Volkswagen, Inc., appearing specially for the purpose of this motion only, and no other, respectfully moves the court to vacate the summons issued and served in this cause upon the following grounds:

1. The Court has no venue over the subject matter herein.
2. The Court has no jurisdiction over the defendant.
3. The purported summons has not been issued, served or returned as by law provided.

Authorities:

Title 12 O.S. Section 187
Title 12 O.S. Section 1701.03
International Shoe Co. v. Washington, 326 U.S. 310 (1945)

Fields v. Volkswagen of America, Inc., 555 P.2d 48 (1976)
Winston Industries, Inc., v. Seventh Judicial Dist, 48 O.B.J. 373 (Feb., 1977)

/S/ Dan A. Rogers
117 East Fifth Street
Tulsa, Oklahoma 74103
Telephone: 583-5111

Attorney for Defendant,
Seaway Volkswagen, Inc.

[Certificate of Mailing omitted]

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLDWIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

ORDER OVERRULING MOTIONS TO QUASH AND PLEA TO THE JURISDICTION

On this 21st day of December, 1977, the above entitled cause comes on for hearing on the Special Appearances, Motions to Quash and Plea to the Jurisdiction of the Court as filed by each and every one of the defendants. All parties were present by and through their attorneys of record.

After having reviewed the Petition, Summons and Motions filed by each and every one of the defendants, the Court finds that each and every Special Appearance and Motion to Quash and Plea to the Jurisdiction of the Court as filed by each of the defendants is hereby overruled with exceptions granted to each defendant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Special Appearances and Motions to Quash and Plea to the Jurisdiction of the Court as filed by each and every defendant herein is

hereby overruled, with exceptions granted to each defendant, and each defendant is hereby given fifteen (15) days to further plead or answer in the above entitled cause.

/S/ Charles S. Woodson
District Judge

Approved as to form:

/S/ Bert M. Jones
Attorney for Volkswagen of America

/S/ Charles Michael Barkley
Attorney for Worldwide Volkswagen

/S/ Dan A. Rogers
Attorney for Seaway Volkswagen, Inc.

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLDWIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.
Defendants.

Filed January 5, 1978

MOTION TO RECONSIDER

Comes now the defendant, Worldwide Volkswagen Corporation, a foreign corporation, and moves this Court to reconsider its ruling of December 21, 1977, overruling defendant Worldwide Volkswagen Corporation's Special Appearance and Denial of Jurisdiction based on the statutes cited in said Motion and Affidavit attached hereto and marked "Exhibit A".

/S/ Mike Barkley
1924 South Utica, Suite 702
Tulsa, Oklahoma 74104
Telephone: (918) 749-8846

Attorney for Defendant,
Worldwide Volkswagen Corporation

[Certificate of Mailing omitted]

EXHIBIT A

STATE OF NEW YORK
COUNTY OF NEW YORK } SS.:

MERVIN ROSENMAN, being duly sworn, deposes and says:

I am Assistant Secretary and General Counsel of defendant World-Wide Volkswagen Corporation (hereinafter "World-Wide") and am fully familiar with the operations and the affairs of that corporation.

World-Wide is a corporation organized and existing under the laws of the State of New York and also is authorized to do business in the states of New Jersey and Connecticut. It has been appointed by Volkswagen of America, Inc. to be the distributor of Volkswagen vehicles, parts and accessories for the above-mentioned states of New York, New Jersey and Connecticut.

World-Wide's only office is in Orangeburg, New York. We are not authorized to do business in the State of Oklahoma; we have never done business in that state and we have no intention of doing business there in the future.

World-Wide does not advertise in any national magazine, or on network television or radio, nor does it participate in any advertising fund or pool placing advertisements in the State of Oklahoma.

World-Wide has no relationship with Volkswagen of America, Inc. other than being an authorized distributor as aforesaid. The two corporations have no common officers, directors or stockholders.

World-Wide does not do any designing or manufacturing of automotive vehicles nor any "make-ready" work. It had nothing to do with the vehicle in question except that it sold same to Seaway Volkswagen, Inc. on January 8, 1976 (we had no relationship with that corporation except that at that time it was an authorized Volkswagen dealership).

/S/ Mervin Rosenman

[Notarization omitted]

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

MOTION TO RECONSIDER

Comes now the defendant, Seaway Volkswagen, Inc., a foreign corporation, and moves this Court to reconsider its ruling of December 21, 1977, overruling defendant Seaway Volkswagen, Inc.'s Special Appearance and Denial of Jurisdiction based on the statutes cited therein and the Affidavit attached hereto and made a part hereof.

/S/ Dan A. Rogers
117 East Fifth Street
Tulsa, Oklahoma 74103
Phone: 583-5111

Attorney for Defendant,
Seaway Volkswagen, Inc.

[Certificate of Mailing omitted]

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.
Defendants.

AFFIDAVIT

I.

Dan A. Rogers, being duly sworn, deposes and says that he is attorney of record for the defendant corporation, Seaway Volkswagen, Inc.

II.

He has personal knowledge of the facts contained herein.

III.

Defendant, Seaway Volkswagen, Inc., hereinafter "Seaway," is a New York corporation with its principal place of business in Massena, New York.

IV.

Defendant Seaway Volkswagen, Inc. has never designated an agent in Oklahoma for service of process upon itself.

V.

Seaway has not entered into any contracts within the State of Oklahoma.

VI.

Seaway has no office, bank account, property or other assets in the State of Oklahoma.

VII.

Seaway is not listed in any Oklahoma telephone directory.

VIII.

Seaway has not committed a tortious act within the State of Oklahoma.

IX.

Seaway does not own, use or possess any real estate situated within the State of Oklahoma.

X.

Seaway does not own or lease any equipment or space situated in the State of Oklahoma.

XI.

Seaway has not contracted to sell, rent or lease any business equipment within the State of Oklahoma.

XII.

The subject action is not related in any way to the presence of Seaway in the State of Oklahoma.

XIII.

Prior to being named a defendant in the subject lawsuit, Seaway was never involved in any litigation in the State of Oklahoma nor did Seaway ever retain a lawyer within the State of Oklahoma.

XIV.

Seaway has never advertised through books, magazines, periodicals, radio, television, or any other part of the media, within the State of Oklahoma.

XV.

Seaway, never had the intention nor foresaw that any of its sales of automobiles would result in their presence in the State of Oklahoma.

/S/ Dan A. Rogers

[Notarization omitted]

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY LOUISE ROBINSON,
Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

ORDER

On this 14th day of June, 1978, the above-entitled cause comes on for hearing on the Defendant World-Wide Volkswagen Corporation's and Defendant Seaway Volkswagen, Inc.'s Motions to Reconsider the Court's jurisdiction and venue. Plaintiff appeared by and through her counsel of record, Mr. Jefferson C. Greer. Defendant World-Wide Volkswagen Corporation appeared by and through its attorney, Mr. Mike Barkley. Defendant Seaway Volkswagen, Inc. appeared by and through its attorney, Mr. Dan A. Rogers, by Mr. Timothy McCormick.

After having examined the Petition and Summons on file, as well as the affidavits filed by each of the defendants herein, the Court finds that the Motions to Reconsider the Court's previous ruling concerning jurisdiction and venue of Defendant World-Wide Volkswagen Corporation and Defendant Seaway Volkswagen, Inc. should be overruled and the defendants given fifteen (15) days to further plead or answer.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Motions to Reconsider this Court's jurisdiction and venue over the parties, Defendant World-Wide Volkswagen Corporation and Defendant Seaway Volkswagen, Inc., are hereby overruled, with exceptions granted, and the defendants are given fifteen (15) days to further plead or answer herein.

/S/ Charles S. Woodson, District Judge

Approved as to form:

/S/ Jefferson G. Greer
Attorney for Plaintiff

/S/ Mike Barkley
Attorney for Defendant World-Wide
Volkswagen Corporation

/S/ Dan A. Rogers
Attorney for Defendant,
Seaway Volkswagen, Inc.

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C 77-100

KAY ELOISE ROBINSON,
Plaintiff,

vs.

AUDI NSU AUTO UNION AKTIENGESELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.,
WORLD-WIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

Filed June 14, 1978

ATTORNEYS LIEN CLAIMED

SECOND AMENDED PETITION

COMES now the plaintiff, KAY ELOISE ROBINSON, and for cause of action against the defendants, alleges and states as follows: Plaintiff adopts the allegations of her Petition and all prior Amendments to Petition.

I.

Plaintiff alleges that at all material times mentioned herein, she was a resident of the State of New York.

II.

The defendant, Audi NSU Auto Union Aktiengesellschaft, hereinafter known as AUDI, is a foreign corporation organized and existing under the laws of Germany. They manufacture Audi automobiles. They are doing business within the State of Oklahoma, although they have not appointed a service agent upon whom service of process can be had.

III.

The defendant, Volkswagen of America, Inc., hereinafter known as Volkswagen of America (VWA), is a foreign corporation organized under the laws of the State of New Jersey, and they are the exclusive importers of Audi automobiles for the entire United States of America.

IV.

The defendant, World-Wide Volkswagen Corporation, is a foreign corporation existing under the laws of the State of New York, and they are exclusive distributors for Audi automobiles for the states of Connecticut, New York and New Jersey.

V.

The defendant, Seaway Volkswagen, Inc., is a foreign corporation existing under the laws of the State of New York, and they are retail automobile dealers for Audi automobiles in Messena, New York.

VI.

Plaintiff, Kay Eloise Robinson, alleges that at all material times mentioned herein, she and the said Harry Robinson were husband and wife, and they are the natural parents of George Samuel Robinson and Eva Mae Robinson.

VII.

(a) Plaintiff alleges that on September 21, 1977, at about 9:15, P.M., she was driving a 1976 Audi automobile, belonging to plaintiff and to her husband, Harry Robinson, westward on the Turner Turnpike within Creek County, Oklahoma, at a point approximately one mile east of the Sapulpa, Oklahoma exit. The plaintiff's minor children, George Samuel Robinson and Eva Mae Robinson, were riding as passengers in the 1976 Audi automobile, then being driven by this plaintiff.

(b) Plaintiff alleges that at the same time and place, another motorist named Lloyd Albert Hull was driving his

1971 Ford automobile in a westerly direction behind the said 1976 Audi automobile, which was being driven by plaintiff, and that the said Lloyd Albert Hull did suddenly thereupon drive his vehicle into and upon the rear of the 1976 Audi automobile being driven by plaintiff, so as to cause the gas tank on the Audi automobile to rupture and the said Audi automobile to erupt in flames; thereby inflicting severe, crippling, painful, permanent and disabling injuries upon this plaintiff and her minor children.

VIII.

Plaintiff alleges that prior to September 21, 1977, the date of the aforementioned accident, the defendant (AUDI) designed, made, manufactured, sold and placed in the stream of interstate commerce a 1976 Audi 100 LS automobile, Serial No. 8161018849. The defendant (AUDI) sold said Audi automobile to defendant (VWA), who imported it into the United States of America. The defendant (VWA) in turn sold said Audi automobile to defendant, World-Wide Volkswagen Corporation, who in turn sold said Audi automobile to Seaway Volkswagen, Inc. Seaway Volkswagen, Inc., later sold said Audi automobile to plaintiff, Kay Eloise Robinson and Harry Robinson on December 15, 1976.

IX.

Plaintiff alleges that all the defendants, at all times material herein, occupied the position and status of the manufacturer of the said Audi automobile involved herein. That as manufacturers, sellers, and distributors of the said Audi automobiles, they advertised the Audi automobile in national magazines which were circulated in Oklahoma. They advertised Audi automobiles on national television, which was broadcast and shown throughout the State of Oklahoma. They manufactured, sold, and distributed the defective and unreasonably dangerous Audi automobile to plaintiff which directly and proximately resulted in injury

and damages to this plaintiff in the State of Oklahoma. They could reasonably anticipate that the said Audi automobile would be used upon the highways of the State of Oklahoma. None of the defendants maintain a service agent within the State of Oklahoma, upon whom service of process can be served.

X.

(a) Plaintiff alleges that the aforementioned Audi automobile, as manufactured and at the time the aforementioned Audi automobile left the possession of each of the defendants, was defective, unsafe and unfit for its intended use as a passenger automobile, and it was unreasonably dangerous in that it was so designed and constructed so that its gas tank was subject to rupture and explosion upon a mild impact from the rear by another vehicle.

(b) Plaintiff alleges that the Audi automobile was further defective in that it was so designed and constructed that there was no fire wall between the passenger compartment and the fuel supply or gas tank location so that upon a slight impact from the rear the gas tank was subject to rupture and explosion; whereby, a gasoline fire could easily spread into the passenger compartment with forseeable and resulting harm to the passengers.

(c) Plaintiff further alleges that the Audi automobile was further defective in that the doors would jam shut upon slight impact from the rear.

(d) Plaintiff further alleges that the Audi automobile was further defective in that it contained no safety features in the electrical system so as to prevent ignition upon impact.

(e) Plaintiff further alleges that the Audi automobile was further defective in that it contained no self-sealing device on the fuel tank.

(f) Plaintiff further alleges that the Audi automobile was

further defective in that the cap on the fuel tank, as well as the spout on the fuel tank, were subject to rupture and separation upon slight impact from the rear.

XI.

Plaintiff alleges that the defective, unsafe, unfit, and unreasonably dangerous condition of the aforementioned Audi automobile was a substantial producing factor in causing plaintiff's injuries and damages and the manufacture, sale and distribution of the said Audi automobile, in its defective and unreasonably dangerous condition, was a direct, proximate and producing cause of plaintiff's injuries and damages.

XII.

Plaintiff alleges that as a direct and proximate result of the defective, unsafe, unfit, and unreasonably dangerous condition of the aforementioned Audi automobile, and the manufacture, sale and distribution thereof, she suffered the following injuries, to-wit:

1. Third degree burns over her upper body and torso.
2. Injury to her eyes.
3. Severe scarring and mutilation of her entire body.
4. Severe physical and emotional shock.
5. Loss of portions of both hands.
6. Other injuries not yet determined, but which will be pleaded later by amendment.

XIII.

Plaintiff alleges that the defendant well knew that the placement of the fuel tank in the 1976 Audi automobile was in a position where it was particularly susceptible to collision, resulting fire and to mutilating injuries to passengers. Likewise, they were aware of the dangers from the defective design and placement of the fuel spout and fuel cap and lack of fire wall in said Audi automobile.

The defendants were well aware of the dangers to users of said Audi automobile and were fully aware of safety features which were available and which could easily have been included in the 1976 Audi automobile and which would have prevented plaintiff's injuries, but the defendants willfully, wantonly, deliberately, and knowingly chose to ignore these safety features, in favor of a cost savings, and chose to make, manufacture, sell and distribute the Audi automobile in its defective and unreasonably dangerous condition while well knowing that harm would result to users of said Audi automobile.

The defendants deliberately sacrificed safety for a cost saving while ignoring the known dangers to passengers, such as plaintiff, from the usual placement of the fuel tank in the rear of the 1976 Audi automobile. Defendants acted with a total utter and reckless disregard for the rights of prospective passengers and users, including this plaintiff, and displayed a willful, wanton, and malicious manner in total disregard for the rights of this plaintiff; because of this, plaintiff should recover punitive damages in the amount of Two Million Dollars ($2,000,000.00), for the purpose of deterring the defendants and others from like or similar conduct in the future.

XIV.

Plaintiff alleges that following her aforementioned injuries, she has suffered and will continue to suffer severe and excrutiating pain, both physical and mental. Her injuries are serious and permanent in nature, and she has suffered permanent physical impairment. She has been permanently scarred, mutilated and disfigured. Her capacity to earn a living has been seriously and permanently impaired. She has suffered a loss of future earnings of Two Hundred Thousand Dollars ($200,000.00).

XV.

Plaintiff alleges that on the date of the aforementioned accident, she was a healthy, able-bodied woman 35 years

of age, and had a life expectancy of 42.5 years, according to the Life Tables of the United States Life Tables of the Department of Health, Education and Welfare.

XVI.

Plaintiff alleges that by reason of all the foregoing, she has suffered a loss in actual damages of Two Million Seven Hundred Thousand Dollars ($2,700,000.00), and she is entitled to exemplary damages of Two Million Dollars ($2,000,000.00), for all of which she clams damages against the defendants.

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, for the sum of Two Million Seven Hundred Thousand Dollars ($2,700,000.00), actual damages and judgment for exemplary damages in the sum of Two Million Dollars ($2,000,000.00), or a total judgment of Four Million Seven Hundred Thousand Dollars ($4,700,000.00), together with her costs and for all other legal and equitable relief to which she may be entitled.

JURY TRIAL DEMANDED

GREER AND GREER
/S/ Jefferson G. Greer

Attorneys for Plaintiff
206 Beacon Building
Tulsa, Oklahoma 74103
(918) 584-3591

Mr. Charles A. Whitebook
Attorney at Law
1700 Fourth NBT Building
Tulsa, Oklahoma 74119
(918) 583-2626

PERMISSION GRANTED THIS 13th DAY OF JUNE, 1978, TO FILE THIS SECOND AMENDED PETITION.

/S/ Charles S. Woodson

Judge of the District Court

[Certificate of Mailing omitted]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 52478

WORLD-WIDE VOLKSWAGEN CORPORATION
and SEAWAY VOLKSWAGEN, INC.,
Petitioners

v.

THE HONORABLE CHARLES S. WOODSON,
District Judge of Creek County, State of Oklahoma,
KAY ELOISE ROBINSON, EVA MAY ROBINSON,
a minor, by an through her father and next friend,
Harry Robinson, GEORGE SAMUEL ROBINSON,
a minor, by and through his father and next friend,
Harry Robinson, and HARRY ROBINSON, individually,
Respondents.

Filed June 29, 1978

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

COME NOW the petitioners and respectfully pray and petition this Court tc assume original jurisdiction in an original proceeding and petitions this Court for a Writ of Prohibition for the following reasons:

1. That on the 18th day of October, 1977, Respondent Kay Eloise Robinson filed her action in the District Court of Creek County, Bristow Division, against these petitioners under the case number C-77-100. Respondent Eva May Robinson, a minor, by and through her father and next friend, Harry Robinson, filed her petition in the District Court of Creek County, Bristow Division, under case number C-77-101. That Respondent George Samuel Robinson, a minor, by and through his father and next friend, Harry Robinson, filed his action in the District Court of

Creek County, Bristow Division, on the 18th of October, 1977, against these petitioners, under case number C-77-102. That the Respondent Harry Robinson filed his action in the District Court of Creek County, Bristow Division, on the 18th day of October, 1977, under case number C-77-103. Copies of the petitions of each of the respondents named herein are attached hereto, incorporated herein, and marked Exhibits A through D.

2. Petitioners state that on the 17th day of November, 1977, Petitioner World-Wide Volkswagen Corporation, duly filed its special appearance, denial of jurisdiction and venue herein, attacking the Court's jurisdiction and venue, a true and correct copy of which is attached hereto, marked Exhibit E. That on the ____ day of November, 1977, Petitioner Seaway Volkswagen, Inc., duly filed its special appearance, motion to quash and denial of jurisdiction herein, a true and correct copy of which is attached hereto and marked Exhibit F.

3. That on the 21st day of December, 1977, the Court set the matters for hearing on the petitioners motions attacking the state Court's jurisdiction and venue. After having examined the pleadings and summons on file, the Court overruled the petitioners motions, as reflected by the order attached hereto, marked Exhibit G, and incorporated herein.

4. That on the 5th day of January, 1978, the petitioners herein duly filed their motions to reconsider the Court's previous overruling of petitioners' special appearance and denial of jurisdiction, and incorporated affidavits hereto, concerning the Court's jurisdiction and venue over petitioners. True and correct copies of the motions to reconsider are attached, marked Exhibits H and I, and incorporated herein.

5. Petitioners further attach hereto copies of the respondents' amended petitions, marked Exhibits J through M, respectively.

6. Petitioners hereby respectfully move the Court to consolidate all four cases of each respondent, for the purposes of hearing petitioners' Application to Assume Original Jurisdiction concerning the Court's proper jurisdiction and venue, upon all matters herein, and hereby incorporates all four cases for the purpose of the filing of one Application to Assume Original Jurisdiction and Petition for Writ of Prohibition.

7. That on the 14th day of June, 1978, the Court conducted a hearing on the petitioners' motions to reconsider the Court's jurisdiction and venue. After having examined the petitions, summons, amended petitions, as well as the affidavits filed herein by each of the petitioners, the respondent, Judges Charles S. Woodson, overruled the petitioners' motions to reconsider the Court's jurisdiction and venue. Copies of the Respondent Judge's orders are attached hereto, marked Exhibits N through Q, respectively, and incorporated herein.

8. Petitioners state that under the allegations contained in the respondents' petitions and amended petitions, it is stated that Petitioner World-Wide Volkswagen Corporation is a foreign corporation, existing under the laws of the State of New York, and are exclusive distributors for Audi automobiles for the States of Connecticut, New York and New Jersey. It is stated that Petitioner Seaway Volkswagen, Inc. is a foreign corporation, existing under the laws of the State of New York, and are retail automobile dealers for Audi automobiles in Massena, New York. Petitioners state that these allegations are true and correct.

9. Petitioners further state that an Audi automobile imported into the United States of America by the defendant in the original action, Volkswagen of America, Inc.,

was thereafter sold to Petitioner World-Wide Volkswagen Corporation, who in turn distributed such automobile to the Petitioner Seaway Volkswagen, Inc., who thereafter sold the Audi automobile, which is the subject of this litigation, to the respondent, Harry Robinson. Petitioners state that at the time of the sale of the automobile to the respondent, Harry Robinson, Harry Robinson and all respondents which are the subjects of the original actions, were residents and citizens of the State of New York.

10. Respondents' allegations against the petitioners are incorporated in respondents' petitions and amended petitions, which are incorporated herein. They basically state that the Audi automobile in question was defective in the design and manufacture. There are no allegations that the petitioners herein manufactured or designed the Audi automobile in question. The allegations against these petitioners are made under the Oklahoma rule of manufacturer's products liability, under the theory that the retailer and distributor stand in the same shoes as the manufacturer concerning liability.

Petitioners state that that theory is well taken. However, petitioners respectfully submit that they should not be parties to the original actions in the District Court in and for Creek County, Bristow Division, because petitioners do not have any minimal contacts whatsoever with the jurisdiction of the District Courts of the State of Oklahoma.

11. Petitioners state that the Respondent Judge is attempting to exercise jurisdiction over these petitioners, even though they do not satisfy the criterion of having any minimal contacts with the State of Oklahoma, and for the respondent Judge to continue to issue orders and exercise jurisdiction over these petitioners is a substantial violation of the due process clause of the Fourteenth Amendment of

the United States Constitution, and contrary to the laws of the State of Oklahoma.

12. Petitioners state that they will be substantially harmed should this Court fail to assume original jurisdiction, and issue a Writ of Prohibition, prohibiting the Respondent Judge from exercising any further jurisdiction over these petitioners.

13. Petitioners state that the respondents have wholly failed to show any type of contract whatsoever, by these petitioners, with the jurisdiction of the boundaries of the State of Oklahoma, and the respondents total failure to do so warrants that this Honorable Court should assume original jurisdiction and issue its Writ of Prohibition, prohibiting the Respondent Judge from exercising any further jurisdiction over these petitioners.

14. Petitioners state that they are asking this Honorable Court to grant their Application and Petition for Writ of Prohibition because this Court has the authority to compel the Respondent Judge to act according to the laws of the United States of America, as well as the laws of the State of Oklahoma. Petitioners further state that they are without further remedies at the trial court level, and if this Honorable Court does not issue a Writ of Prohibition, prohibiting the trial court from acting any further concerning authority over these petitioners, then they will suffer from undue injustice and great harm. Petitioners state that they have exhausted any and all remedies that they have at the trial court level, concerning the Respondent Judge.

WHEREFORE, petitioners pray that this Honorable Court assume original jurisdiction and, having done so, issue its Writ prohibiting the Respondent Judge from exercising any further jurisdiction over these petitioners.

Hall, Estill, Hardwick, Gable,
Collingsworth & Nelson

By Mike Barkley
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103
(918) 588-2738

Attorneys for Petitioner
World-Wide Volkswagen
Corporation

Rogers, Rogers & Jones
By Dan Rogers
117 E. 5th Street
Tulsa, Oklahoma 74103
(918) 583-5111

Attorneys for Petitioner
Seaway Volkswagen, Inc.

[Notarizations and Certificate Of Mailing omitted]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 52,478

WORLD-WIDE VOLKSAGEN CORPORATION
and SEAWAY VOLKSWAGEN, INC.,
Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON,
District Judge of Creek County, State of Oklahoma,
KAY ELOISE ROBINSON, EVA MAY ROBINSON,
a minor, by and through her father and next friend,
HARRY ROBINSON, and HARRY ROBINSON,
individually,
Respondents.

ORIGINAL PROCEEDING
ON APPLICATION TO ASSUME
ORIGINAL JURISDICTION
AND PETITION FOR WRIT
OF PROHIBITION

**ORIGINAL JURISDICTION
ASSUMED AND WRIT DENIED**

(The full text of this Order and Opinion is reprinted as Appendix in the Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma, Filed herein on January 5, 1979.)

Supreme Court, U. S.
FILED
JAN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

World-Wide Volkswagen Corporation and
Seaway Volkswagen, Inc.,
Petitioners

v.

The Honorable Charles S. Woodson, District Judge of Creek County, State of Oklahoma, Kay Eloise Robinson, Eva May Robinson, a minor, by and through her father and next friend, Harry Robinson, George Samuel Robinson, a minor, by and through his father and next friend, Harry Robinson, and Harry Robinson, individually,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT

Jefferson G. Greer
206 Beacon Building
Tulsa, Oklahoma 74103

Charles A. Whitebook
1700 Fourth NBT Building
Tulsa, Oklahoma 74119

ATTORNEY FOR RESPONDENTS

Of Counsel:
Greer & Greer
206 Beacon Building
Tulsa, Oklahoma 74103

TYPE SERVICE CO., Law Brief Printing Division, 507 S. Quaker, Tulsa, OK 74120 (918) 587-2052

INDEX

Page

Opinion Below 1

Jurisdiction 1

Constitutional Provision and Statute Involved 2

Question Presented 2

Statement of the Case 2

Reasons For Denying The Writ

A. This matter is moot because the defendants have entered a general appearance in the Trial Court .. 4

B. Previous Opinions of this Court have established the perimeters of Due Process 5

C. This Court has previously refused to grant Certiorari where "single act" long-arm statutes with similar factual situations was involved 8

D. The exercise of in personam jurisdiction by an Oklahoma Court over a regional New York distributor and one of his retail dealers, based upon a tort committed in New York which results in injury in Oklahoma, is permissible under the due process clause of the Fourteenth Amendment 9

E. The Oklahoma Court is the most convenient forum for the trial of this action 21

Conclusion 23

Appendix 25

Table of Cases

Ada Dairy Products vs. Superior Court of Seminole County, 258 P.2d 939 (Okl 1953) 5

Ajax Realty Corporation vs. J. F. Zook, Inc., (CA 4 Va), 493 F.2d 818, cert den, 411 U.S. 966, 36 L.Ed.2d 687, 93 S.Ct. 2148 ..... 8, 15, 23

Page

Anderson vs. National Presto Industries, Inc., 135 N.W.2d 639 (Iowa 1965) 17

Atkins vs. Jones and Laughlin Steel Corporation, 104 N.W.2d 888 (Minn. 1960) 17

Carmack vs. Chemical Bank New York Trust Company, 536 P.2d 895, (Okl. 1975) 18

Dunnigan vs. A. H. Robins Company, 559 P.2d 750 (Idaho 1977)..... 12

Estin vs. Estin, 344 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948) 8

Fields vs. Volkswagen of America, Inc., 555 P.2d 48, 84 A.L.R.3d 1199 (Okl. 1976)..... 15, 18

Golden Gate Hop Ranch, Inc. vs. Velsicol Chemical Corporation, 403 P.2d 351, (Wash. 1965), cert den, 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 539 ..... 8, 15

Gonzales vs. Harris Calorific Company, 64 Misc.2d 287, 315 N.Y. Supp.2d 51, aff'd 35 App.Div.2d 720, 315 N.Y.Supp.2d 815 17

Gray vs. American Radiator and Standard Sanitary Corporation, 176 N.E.2d 761 (Ill. 1961) ... 15

Hanson vs. Denckla, 357 U.S. 253, 78 S.Ct. 1240, 2 L.Ed.2d 1298, 78 S.Ct. 1228 ..... 7, 14, 15, 21

Harford vs. Smith, (119 66 D.C.W.Va.), 257 F.Supp. 578 17

Hines vs. Clendenning, 465 P.2d 460 (Okl. 1970)..... 18

Hutchinson vs. Body & Sons Press Sales, Inc., 188 F.Supp. 876 (D.C.D.Mindd. 1960)..... 16

Page

International Shoe Company vs. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945)..... 5, 9, 13, 15, 16, 21

Jameson vs. Harvel, 280 P. 1080 (Okl. 1929) 4

Kimball vs. Kimball, 174 U.S. 158, 43 L.Ed. 932, 19 S.Ct. 639..... 5

Kulko vs. Superior Court of California, 98 S.Ct. 1690 (1978)..... 7, 8

Little vs. Bowers, 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620..... 5

McCoy vs. Wean United, Inc., 67 F.R.D. 491 (D.C. Tenn.) 12

McGee vs. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)..... 6, 13, 16, 21, 23

Metal Matic, Inc. vs. Eighth Judicial District Court, 415 P.2d 617, (Nev. 1966)..... 17

Painter vs. Home Finance Company, 96 S.E.2d 731 16

Phillips vs. Anchor Hocking Glass Corporation, 413 P.2d 732, (Ariz. 1966) annotated at 19 A.L.R.3d 1 ..... 12, 13, 14, 21

Reilly vs. Phil Tolkan Pontiac, Inc., 372 F.Supp. 1205 (U.S.D.C.-D.N.J. 1974)... 9, 11, 18

Roche vs. Floral Rental Corporation, 95 N.J.Super. 555, 232 A.2d 162 (App.Div. 1967) 10, 11

Rosenblatt vs. American Cyanamid Company, 86 S.Ct. 1, (1965) 16

Page

Severson vs. Home Owners Loan Corporation, 88 P.2d 344 (Okl. 1939) 4

Smyth vs. Twin State Improvement Corporation, 80 A.2d 664, 25 A.L.R.2d 1193 16

Texair Fliers, Inc. vs. District Court, First Judicial District, 506 P.2d 367 (Col.) 17

Webster vs. Crump, 246 P. 423 (Okl. 1926) 4

Other Authorities Cited

Appearance, 5 Am.Jur.2d, Section 21, page 496, 497 ..... 4, 5

Cleary, The Length of the Long-Arm, 9 Journal of Public Law 293 14

Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions, 64 Mich.L.R. 1028 14

Currie, The Growth of the Long Arm, 1963 U.Ill.Law Forum 515, 540 16

Federal Practice and Procedure, § 252, p. 720, 32 Am.Jur.2d 5

Oklahoma Statute, Title 12, Section 1701.03(a) (4) 4

Uniform Interstate and International Procedure Act, 12 O.S. (1971) Section 1701.01, et seq. 18

IN THE

Supreme Court of the United States

October Term, 1978

No.

World-Wide Volkswagen Corporation and
Seaway Volkswagen, Inc.,
Petitioners

v.

The Honorable Charles S. Woodson, District Judge of Creek County, State of Oklahoma, Kay Eloise Robinson, Eva May Robinson, a minor, by and through her father and next friend, Harry Robinson, George Samuel Robinson, a minor, by and through his father and next friend, Harry Robinson, and Harry Robinson, individually,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Opinion Below

The opinion of the Oklahoma Supreme Court, not yet reported, appears in the Appendix to petitioners' brief (1a-6a). The District Court of Creek County, Oklahoma, the lower court, rendered no opinion.

Jurisdiction

The basis for this Court's jurisdiction is properly stated in petitioners' brief and will not be repeated here.

Constitutional Provision and Statute Involved

These provisions and the statute involved are correctly stated in petitioners' brief and are not repeated here.

Question Presented

The question presented is whether a remote seller and distributor of a defective automobile, who places his product in the stream of interstate commerce, is subject to the jurisdiction of the Courts of Oklahoma, where the automobile causes injury within the State of Oklahoma, due to the defect in the automobile.

Statement of the Case

Harry Robinson, a New York resident, and his wife, Kay Eloise Robinson, purchased an Audi automobile from Seaway Volkswagen, Inc., ("Seaway"), in Massena, New York on December 15, 1976.

The Audi automobile in question was manufactured by Audi NSU Auto Union Aktiengesellschaft in Germany. It was thereafter imported into the United States by Volkswagen of America, Inc., who is the distributor for all of the United States for all Volkswagen products, including Audi automobiles. Volkswagen of America, Inc. then sold and delivered the Audi automobile to the defendant distributor, World-Wide Volkswagen Corporation ("World-Wide"), who in turn sold and distributed this vehicle to ("Seaway") in Messena, New York. Defendant ("World-Wide") is a New York corporation, as is ("Seaway").

Both Volkswagen of America, Inc., and Audi NSU Auto Union Aktiengesellschaft are subsidiaries of Volkswagen of Germany. ("World-Wide") is the Audi distributor for the states of New York, New Jersey, and Connecticut. According to their published list of distributors and dealers, Volkswagen of America, Inc. has seven exclusive regional distributors located throughout the

United States. There are several hundred Audi dealerships throughout the United States and Canada, with Audi dealers in every state of the union, including Alaska and Hawaii, and including four in the State of Oklahoma. Their literature shows 24 dealerships within the State of New York alone, with 12 dealerships located in New Jersey, and 8 located in the State of Connecticut.

On the 21st day of September, 1977, Mr. Robinson, accompanied by his wife and children, was travelling near Sapulpa, Oklahoma, on the Turner Turnpike (I-44) which parallels old U.S. Highway 66 from Tulsa to Oklahoma City, when his Audi automobile was rear ended by another vehicle, resulting in a fire and holocaust as a result of the design and placement of the gas tank and the fuel system on the Audi automobile, which resulted in mutilating and disabling injuries to his wife and two children.

Plaintiff's wife and children were subsequently hospitalized at Tulsa, Oklahoma, for over five months, during which time plaintiffs filed suit against the defendant manufacturer, Audi NSU Auto Union Aktiengesellshaft; the importer, Volkswagen of America, Inc.; the distributor, World-Wide Volkswagen Corporation; and the local Audi dealer, Seaway Volkswagen, Inc.

All the defendants first sought to remove the action filed in Creek County District Court of Oklahoma, to the United States District Court for the Northern District of Oklahoma. The United States District Court for the Northern District of Oklahoma determined that plaintiffs, since they were in transit to a new home in Arizona, were still residents of New York, and that there was no diversity of citizenship between the plaintiffs and New York defendants, and therefore no basis for their jurisdiction. The case was remanded to the District Court of Creek County, Oklahoma, and thereafter the defendants sought a writ of prohibition in the Supreme Court of the State of

Oklahoma. The defendant manufacturer and distributor did not join in this petition for Writ of Prohibition.

On October, 10, 1978, the Oklahoma Supreme Court denied the writ of prohibition, holding that the District Court of Creek County could exercise jurisdiction under the Oklahoma's "Long-Arm" Statute, a "single act" statute, because, under the circumstances of the case, and under the evidence adduced in the Trial Court, it was established that the petitioners "derived substantial revenue from goods used in the State of Oklahoma." Oklahoma Statute, Title 12, Section 1701.03(a) (4).

The petitioners then filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE WRIT

A. THIS MATTER IS MOOT BECAUSE THE DEFENDANTS HAVE ENTERED A GENERAL APPEARANCE IN THE TRIAL COURT.

The defendant, World-Wide Volkswagen Corporation, in a pleading entitled SPECIAL APPEARANCE, DENIAL OF JURISDICTION AND VENUE, challenged the jurisdiction of the Oklahoma Trial Court not only over the person of the defendant, but jurisdiction of the *subject matter* as well, and further asked for dismissal of the action because of lack of the Court's jurisdiction over the *subject matter.* (Appendix, p.25)

While the authorities are split on whether this would constitute a general appearance, 5 Am.Jur.2d, *Appearance,* Section 21, page 496, Oklahoma has clearly ruled that challenging the jurisdiction of the Trial Court over the subject matter does constitute a general appearance. *Webster vs. Crump,* 246 P. 423 (Okl 1926); *Jameson vs. Harvel,* 280 P. 1080 (Okl 1929), and *Severson vs. Home Owners Loan Corporation,* 88 P.2d 344 (Okl 1939).

In an annotation, OBJECTION BEFORE JUDGMENT TO JURISDICTION OF COURT OVER SUBJECT MATTER AS CONSTITUTING GENERAL APPEARANCE, appearing at 25 A.L.R.2d 833, the authors have listed the majority jurisdictions where this rule is followed.

Both defendants, World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., have participated in the taking of plaintiffs' depositions on other than jurisdictional grounds in which they inquired at great length about the liability issues and the plaintiffs' damages involved in the action. Although they attempted to make these inquiries without prejudicing themselves by stating that they were not waiving any of their rights in doing so, this was not pursuant to any stipulation or agreement of counsel. By participating in the taking of depositions on non-jurisdictional issues, both defendants entered a general appearance. 5 Am.Jur.2d, *Appearance,* Section 21, page 497, and *Ada Dairy Products vs. Superior Court of Seminole County,* 258 P.2d 939 (Okl 1953).

A real and substantial federal question is essential to the jurisdiction of the U.S. Supreme Court over judgments of state courts. The federal question cannot be one that is moot. *Kimball vs. Kimball,* 174 U.S. 158, 43 L.Ed. 932, 19 S.Ct. 639, *Little vs. Bowers,* 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620. 32 Am.Jur.2d, Federal Practice and Procedure § 252, P. 720.

For this reason alone the Petition for Writ of Certiorari should be denied.

B. PREVIOUS OPINIONS OF THIS COURT HAVE ESTABLISHED THE PERIMETERS OF DUE PROCESS.

In *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945), the Court estab-

lished the rule that in order for a person to become subject to in personam jurisdiction, one must only have "minimum contact such that the maintenance of the suit does not offend 'traditional notion of fair play and substantial justice'."

Twelve years later, this Court handed down the decision in *McGee vs. International Life Insurance Company,* 355 U.S. 220, 78 S.Ct. 199 (1957), where the Court decreed that an insurance contract delivered in California, with premiums being mailed from there to a Texas insurance company, was sufficient to give the California Court jurisdiction, even though the Texas company had no offices or agents in California, and apparently never solicited or done any insurance business in California, apart from the single policy involved.

In the *McGee* case, the Court reaffirmed the principle that a defendant must have certain minimum contacts with the forum state such that the maintenances of the suit does not offend the traditional notions of fair play and substantial justice.

In considering the history of long-arm jurisdiction, this Court stated:

> "Looking back over this long history of litigation, a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today, many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time, modern transportation and communication have made it much less burdensome for a party sued to

> defend himself in a state where he engaged in economic activity."

In *Hanson vs. Denckla,* 357 U.S. 253, 78 S.Ct. 1240, 2 L.Ed.2d 1298, this Court considered the question of whether a Florida Court could exercise jurisdiction over a Pennsylvania trust company, where the trust had no office in Florida, transacted no business there, none of the trust assets were held or administered in Florida, and the trust company had solicited no business in the State, either in person or by mail.

In considering the facts in the *Denckla* case, the Court pointed out that:

> "The cause of action in this case is not one that arises out of an act done or transaction consumated in the forum state. In that respect, it differs from McGee vs. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2L.Ed.2d 223, in the cases there cited."

The preceding cases were followed in *Kulko vs. Superior Court of California,* 98 S.Ct. 1690 (1978), where a California Court attempted to exercise jurisdiction over a New York resident in a domestic case where the defendant ex-husband's only contact with the State of California was agreeing to and sending one of his children to his divorced wife in California. The California Court had maintained that, pursuant to their statute, the nonresident defendant had caused an "effect in the state by an act or omission outside the state," and that personal jurisdiction over the defendant would lie.

This Court, in the *Kulko* case, while denying the right of the California courts to exercise in personam jurisdiction over the defendant husband, went on to state that an essential criterion in all cases is whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense

in that state. What is fair, stated the Court, is a question in which few answers will be written "in black and white." "The grays are dominant and even among them the shades are inumerable." *Estin vs. Estin,* 344 U.S. 541, 68 S.Ct. 1213, 92 L.Ed 1561 (1948).

The Court, in the *Kulko* case, distinguished between the circumstances there and an act occurring outside of the state causing injury within the state, while stating:

> "There is no claim that appellant has visited physical injury on either property or persons within the State of California. Compare *Hess vs. Pawloski,* 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed 1091 (1927). The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations."

C. THIS COURT HAS PREVIOUSLY REFUSED TO GRANT CERTIORARI WHERE "SINGLE ACT" LONG-ARM STATUTES WITH SIMILAR FACTUAL SITUATIONS WAS INVOLVED.

Certiorari was denied by this Court in *Ajax Realty Corporation vs. J. F. Zook, Inc.,* (CA 4 Va), 493 F.2d 818, cert den, 411 U.S. 966, 36 L.Ed.2d 687, 93 S.Ct. 2148, where a manufacturer and seller in the State of Washington sold window frames to a Colorado distributor, who in turn sold them to a Virginia corporation where they caused injury. In a diversity action, in the Virginia Federal Court, it was held by the trial court that jurisdiction under the long-arm statute was proper. This was affirmed by the Fourth Circuit and certiorari was denied by this Court.

Certiorari was also denied in *Golden Gate Hop Ranch, Inc. vs. Velsicol Chemical Corporation,* 403 P.2d 351 (Wash 1965), cert den, 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 539, the Washington Court exercised jurisdiction over a nonresident because of crop injury within the State of Washington, occurring as a result of a nonresident recommending the use of a product on the crops while outside the State of Washington.

D. THE EXERCISE OF IN PERSONAM JURISDICTION BY AN OKLAHOMA COURT OVER A REGIONAL NEW YORK DISTRIBUTOR AND ONE OF HIS RETAIL DEALERS, BASED UPON A TORT COMMITTED IN NEW YORK WHICH RESULTS IN INJURY IN OKLAHOMA, IS PERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Reilly vs. Phil Tolkan Pontiac, Inc.,* 372 F.Supp. 1205 (U.S.D.C.-D.N.J. 1974) a diversity action was instituted in the United States District Court for the District of New Jersey, against a Wisconsin automobile dealer for injuries sustained as a result of a defective jack which the defendant automobile dealer had sold to plaintiff in Wisconsin. Subsequently, plaintiff moved to New Jersey, where he sustained injury as a result of the defective jack.

The defendant, in the *Reilly* case, contended that the New Jersey Court did not have, under the doctrine of *International Shoe Company vs. State of Wisconsin,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the "minimum contacts" with the State of New Jersey to bring the defendant within the court's diversity jurisdiction.

The Court noted that New Jersey's long-arm statute allowed **service to the uttermost limits permitted by the United States Constitution.** The Court went on to state that the New Jersey Courts have steadily allowed the extension of state long-arm jurisdiction in cases involving defective items sold in the general flow of commerce. The

New Jersey Court cited a long list of cases allowing jurisdiction to be exercised under the long-arm statute, and particularly cited *Roche vs. Floral Rental Corporation,* 95 N.J.Super. 555, 232 A.2d 162 (App.Div. 1967), where suit was brought against a New York corporation that installed a refrigerator body in a truck owned by a company doing business in New York, where the truck was delivered to the owner in New York. The truck subsequently traveled in New Jersey, and there was an accident in which the refrigerator body's design was a contributing factor. The defendant there claimed that there was not sufficient contacts to allow jurisdiction under the New Jersey Court.

In the *Roche* case, the Court cited Restatement, Conflict of Laws 2d, Section 37 (May 2, 1967), which provides:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to causes of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

The Court, in the *Roche* case, further cited the discussion of Section 37, as follows:

> "[Jurisdiction is valid where]: (1) the act was done with the intention of causing effects in the state; (2) the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and [invalid where] (3) the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so."

The Court, in the *Roche* case, further pointed out that the use of a product in New Jersey was deemed to have been reasonably foreseeable, in view of the fact that much of the traffic from the New York City area to the

rest of the country would normally pass through New Jersey.

The Court, in the *Reilly* case, adopted the holdings in the *Roche* case and held that it was not unreasonable to assume that defendant dealer should have anticipated that the Pontiac it sold to plaintiff and the jack within it would come to be used in other states, including New Jersey. The Court stated:

> "Automobiles are items that by their nature, and by the driving habits of Americans, commonly traverse long distances. Tolkan (dealer) knew that it was selling a product that is distributed, and for which spare parts are available, throughout the nation. Further, the car sold to plaintiff in 1967 was a 1966 model, presumably with several years and much mileage remaining in its useful life. Tolkan is located in a major metropolitan area, which reflects the mobile patterns of modern society. Thus, Tolkan should be prepared to defend on alleged defects in the product it sold which had consequences in New Jersey."

The *Reilly* case is certainly analogous to the present case under consideration where the defendant distributor, with 44 dealers throughout three heavily populated states, could certainly anticipate cross-country travel on Route 66, the most heavily traveled inter-continental route, which runs through Oklahoma. It is therefore reasonable for them to have anticipated that their products distributed in interstate commerce would be used and substantial revenue derived from the goods used in Oklahoma.

Furthermore, since defendants' list of authorized Audi dealers show that Oklahoma has four dealerships, two of which are located on Route 66 in Tulsa and Oklahoma City, it is reasonable to believe that eastern travelers in Audi automobiles traveling cross-country would certainly seek service in Oklahoma, with their Audi auto-

mobiles. As for the retail dealer Seaway, since it is located in a state which is the second most populated state in the United States, it too could reasonably anticipate the use of Audi automobiles in Oklahoma.

It can hardly be questioned that the fairness test is satisfied where the marketing channels bring the goods into the forum, so it is only a short step in logic to conclude that the "fairness" test it met when the customer himself, in the possession of a product mobile by its very nature, brings the product into the forum state himself and is using it for the intended purpose. Frumer and Friedman Products Liability, Section 4501. [Emphasis ours]

In *McCoy vs. Wean United, Inc.*, 67 F.R.D. 491 (D.C. Tenn), a manufacturer of a punch press sold it to a Michigan manufacturer after which the press was subsequently taken by Tennessee by the Michigan manufacturer's successor. It was held that the manufacturer of the punch press was subject to process in the Tennessee courts for injury which occurred in that state.

In *Dunnigan vs. A. H. Robins Company,* 559 P.2d 750 (Idaho 1977), an intra-uterine device, known as the Dalkon Shield, was inserted into plaintiff who lived in California, and who subsequently moved to Idaho, where infection and a tubal abscess developed, requiring surgical removal of her fallopian tubes, as a result of the defective design and manufacture, etc., of the Dalkon Shield. It was there held that the single "tortious act" was committed within Idaho, and the Court retained jurisdiction.

In *Phillips vs. Anchor Hocking Glass Corporation,* 413 P.2d 732, (Ariz 1966), annotated at 19 A.L.R.3d 1, PRODUCTS LIABILITY: IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER OR SELLER UNDER "LONG-ARM" STATUTES, the Arizona Court held that it had jurisdiction over an Ohio corporation who had manufactured a dish which caused

injury in Arizona. No allegation was made that the dish was purchased in Arizona, or that the defendant was doing business in Arizona at the time of the purchase, the time of the injury, or when the complaint was filed.

The Arizona Court, for injury sustained while using the dish in Arizona, allowed personal jurisdiction to be acquired by the Arizona Court over a nonresident defendant who had "caused an event to occur in this State out of which the claim which is the subject of the complaint arose." This statute, the Court stated, was intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States, and held that it met the "minimum contacts," and "fairness" test of *International Shoe Company vs. State of Washington,* 326 U.S. 310, and *McGee vs. International Life Insurance Company,* 355 U.S. 220.

The Court, in the *Phillips* case, pointed out that the important trend in our notions of fairness has been a shift from emphasizing what is fair to the defendant, to a consideration what is fair to both parties. The Court went on to state as follows:

> "It has been said that fair play and substantial justice are satisfied if (1) the cause of action involves local contacts which make it reasonably desirable from plaintiff's point of view that the case be tried at the selected forum, (2) the defendant has sufficient causal responsibility for the presence of the local contacts in the forum state to permit us to conclude that he has by his own volition subjected himself to answering for them there, and (3) relevant public interests are served, or not disserved, by allowing the cause to be determined at that forum. Leflar, The Converging Limits of State Jurisdictional Powers, 9 Journal of Public Law 282.

The Court, in the *Phillips* case, in criticizing *Hanson vs. Denckla,* infra; wherein, the Supreme Court, in the *Hanson* case, had stated that the defendant must "purposefully" avail himself of the privilege of conducting activities within the forum State, noted that this language had given many state courts much confusion and observed that to construe it literally would be to revitalize the "implied consent" theory which was emasculated by the *International Shoe* case and to reverse the trend expanding state jurisdiction over nonresidents which trend was recognized in the *Hanson* decision. The Court pointed out that to make the requirement of "purposeful activity" within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction over the defendant.

The Arizona Court went on to note that tortious and negligent acts are obvious examples in which it is unrealistic to say that the actors first considered the laws of the state in which such acts were committed. The Court stated:

> "A rule limiting jurisdiction to defendants who "purposefully" conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state." Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions, 63 Mich.L.R. 1028.

The Arizona Court further noted that Professor Cleary, in his article "The Length of the Long-Arm," 9 Journal of Public Law 293, concluded that state courts hold that the commission of a tort within the territory of the forum, or sustaining injury within the territory of the forum from a tort committed elsewhere, is a sufficient contact upon which to base jurisdiction over the defendant as regards that tort.

In pointing out that the "purposeful activity" language of *Hanson* is deemed by some courts to be met if the event is foreseeable, the Court concluded that the requirements of fair play does not require that the event be forseeable, pointing out that a manufacturer's primary interest is the consumption of his product and not where it is consumed, and that he should be held liable for damage caused by his product, whether suit is brought in his state or in the plaintiffs state.

The Courts have not distinguished between a manufacturer and a distributor, or seller of a product. Restatement of Torts (Second) Section 402(a) speaks of "sellers" and does not distinguish between the remote manufacturer, distributor, processor, or seller. Oklahoma has held that the term manufacturer includes manufacture, processor, distributor, and sellers. *Fields vs. Volkswagen,* 555 P.2d 48 (Okl 1976), and *Gray vs. American Radiator and Standard Sanitary Corporation,* 176 N.E.2d 761 (Ill 1961).

In *Gray vs. American Radiator and Standard Sanitary Corporation,* 176 N.E.2d 761 (Ill 1961), the defendant challenged the jurisdiction where he had manufactured a safety valve which he sold outside his jurisdiction to a radiator manufacturer who incorporated it in his product. The radiator was in the forum state when it exploded injuring the plaintiff. The Illinois Court held that since the injury occurred in that state, the statute was satisfied, the defendant was subject to jurisdiction over his person, even though this was only a single tortious act occurring within the forum, and that it met the "minimum contacts" requirement of *International Shoe* and satisfied traditional notions of fair play.

The cases of *Ajax Realty Corporation vs. J. F. Zook, Inc.,* 493 F.2d 818, (4th Cir. 1972), cert den 411 U.S. 966, 36 L.Ed.2d 687, 93 S.Ct. 2148, and *Golden Gate Hop Ranch, Inc. vs. Velsicol Chemical Corporation,* 403 P.2d

351, cert den 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 539, previously cited are, of course, cases holding that where injury arises in a forum state from the use of a defective product because of the act or ommission occurring outside the state the Court may properly exercise jurisdiction.

In *Rosenblatt vs. American Cyanamid Company,* 86 S.Ct. 1, (1965) Justice Goldberg concluded that the logic of the Supreme Court's decision, in *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95, and *McGee vs. International Life Insurance Company,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223, supports the validity of "long-arm statutes" which, like the New York statute involved, based in personam jurisdiction upon commission of a "tortious act" in the forum state. Justice Goldberg there stated:

> "In cases under these statutes in state and federal courts jurisdiction on the basis of a single tort has been uniformly upheld." *Smyth vs. Twin State Improvement Corporation,* 80 A.2d 664, 25 A.L.R.2d 1193; *Painter vs. Home Finance Company,* 96 S.E.2d 731; and *Hutchinson vs. Body & Sons Press Sales, Inc.,* 188 F.Supp. 876 (D.C.D.Mindd. 1960).

Justice Goldberg quoted from an article by Professor Currie, as follows:

> "Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on 'consent' but on the interest of the forum State and the fairness of trial there to the defendant." Currie, The Growth of the Long Arm, 1963 U.Ill.Law Forum 515, 540.

In the following product liability cases, included in an annotation in 19 A.L.R.3d 13, PRODUCTS LIABILITY: IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER OR SELLER UNDER "LONG-ARM" STATUTE, it has been held, expressly or by implication, that the presence of a product in the state of the forum and injury resulting in that state may be a sufficient "contact" satisfying due process. *Harford vs. Smith,* (119 66 D.C.W.Va), 257 F.Supp. 578; *Anderson vs. National Presto Industries, Inc.,* 135 N.W.2d 639 (Iowa 1965); *Atkins vs. Jones and Laughlin Steel Corporation,* 104 N.W.2d 888 (Minn 1960); and *Metal Matic, Inc. vs. Eighth Judicial District Court,* 415 P.2d 617 (Nev 1966).

The Colorado Court has also held in the case of *Texair Fliers, Inc. vs. District Court, First Judicial District,* 506 P.2d 367 (Col), that where an aircraft owners conduct in failing to inspect an aircraft and in failing to determine the proficiency of the pilot occurred in a foreign state, which negligent acts thereafter resulted in a crash in Colorado, the aircraft owner could be subjected to the long-arm jurisdiction of the Colorado Court and held that the commission of a single tort within the state without any additional "minimum contacts" would give the Colorado courts jurisdiction.

The New York courts, in the case of *Gonzales vs. Harris Calorific Company,* 64 Misc.2d 287, 315 N.Y. Supp.2d 51, aff'd 35 App.Div.2d 720, 315 N.Y.Supp.2d 815, held that where the plaintiff was injured when an oxygen pressure regulator and high pressure gauge of welding equipment exploded and injured him in New York, the foreign sellers and manufacturer were subject to the jurisdiction of the New York courts where this equipment had been manufactured by an Ohio corporation, sold to a New Jersey corporation which in turn sold it to

another New Jersey corporation, who then sold it to its New York affiliate where it was sold to plaintiff's employer prior to the time that plaintiff used and was injured by the product.

We respectfully submit to the Court that the only "contact" that the State of New York has with this case, other than the residence of the petitioning defendants, is that the Audi automobile was sold in New York.

The Oklahoma Court was clearly within the limits of due process in exercising In Personam Jurisdiction over the Defendants under the holdings of this Court.

The Supreme Court of Oklahoma, has, as has the Court in *Reilly vs. Phil Tolkan Pontiac, Inc.*, supra, repeatedly held that the Oklahoma Long-Arm Statute was intended to and does extend jurisdiction of the Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the Federal Constitution, and is to be construed to widen constitutional bases upon which the Court of Oklahoma may exercise in personam jurisdiction consistent with due process. *Fields vs. Volkswagen of America, Inc.*, 555 P.2d 48 (Okl 1976), 84 A.L.R.3d 1199; *Carmack vs. Chemical Bank New York Trust Company*, 536 P.2d 895, (Okl 1975); and *Hines vs. Clendenning*, 465 P.2d 460 (Okl 1970).

The Supreme Court of Oklahoma was fully conscious of the constitutional limits of due process and exceedingly cautious in the exercise of personal jurisdiction over the petitioners through service under the Uniform Interstate and International Procedure Act. 12 O.S. (1971), Section 1701.01, et seq. and commonly referred to as the Oklahoma Long-Arm Statute.

This Court will give great weight to the determination and findings of the Supreme Court of Oklahoma, that:

"In the case before us, the product being sold and

distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State.

"Because the trial court was justified in concluding that the petitioners derived substantial revenue from goods used within the State, and because alleged acts or omissions on the part of petitioners outside the State allegedly caused tortious injury in this State, we hold that the trial court had the power, pursuant to 12 O.S. 1971, § 1701.03(a)(4), to exercise personal jurisdiction over the petitioners. As the trial court had such power, we refuse to issue a writ of prohibition.

The findings and the determination of the Supreme Court of Oklahoma, we respectfully submit, is fully consistent with the prior rulings of this Court and comply with the requirements of due process under the Fourteenth Amendment of the Constitution of the United States.

We call the Court's attention to the fact that in the trial court, the District Court of Creek County, Oklahoma, in the case of each of the plaintiffs who were injured in the accident involving the Audi automobile, not only World-Wide Volkswagen Corporation and Seaway Volks-

wagen, Inc., were named as defendants, but their sister and affiliated corporations, all with subsidiaries that are largely controlled by Volkswagen Aktiengesellschaft were joined as party defendants. Each of the cases named Audi NSU Auto Union Aktiengesellschaft, Volkswagen of America, Inc., World-Wide Volkswagen Corporation, and Seaway Volkswagen, Inc., as party defendants.

We believe it is significant that on the 28th day of August, 1978, the defendants, Audi NSU Auto Union Aktiengesellschaft, and Volkswagen of America, Inc., filed their Answers to the Petition and the Amendments to the Petition of the plaintiffs, and that those cases are at issue, and upon a completion of discovery, are ready for trial.

We additionally believe it is of significance that on the 26th day of October, 1978, and subsequent to the rendition of the opinion of the Supreme Court, denying their Application for a Writ of Prohibition, the petitioners herein, World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., filed in the District Court of Creek County, Oklahoma, their application for an additional ten (10) days from that date and until November 6, 1978, within which to answer to the plaintiffs' Petition.

We further believe it is of significance that instead of expeditiously filing in this Court this Application for a Writ of Certiorari to the Supreme Court of Oklahoma, on November 6, 1978, these defendants filed a Motion to Stay all Proceedings. That motion was duly heard by the District Court of Creek County, Oklahoma, and was denied by order dated November 28, 1978.

The Petition in this action was filed on October 18, 1977. Some two long years have passed and issue has not yet been joined. We believe that the record and these cases demonstrate a purposeful, deliberate, and planned strategy of delay. This Court will take judicial notice that delay

is a weapon for defeat of the economically disadvantaged plaintiff. Delayed justice is no justice. The plaintiffs are not in a position to continue to battle the economic resources of multi-national corporations over long periods of time.

To deny the plaintiffs jurisdiction in Oklahoma, as against these defendants, would result in a multiplicity of actions cross-country. Trial of the action against the manufacturer, Audi NSU Auto Union Aktiengesellschaft, and as against the importer, Volkswagen of America, Inc., would still be in Oklahoma. These defendants have joined the issue, filed answers and are not and have not joined in their Application for Writ of Certiorari to the Supreme Court of Oklahoma. They have recognized the jurisdiction of the Oklahoma courts.

We respectfully submit that to require that plaintiffs maintain two actions to complete their day in Court would not square with the requirements of "fair play and substantial justice" of prior decisions of this court.

E. THE OKLAHOMA COURT IS THE MOST CONVENIENT FORUM FOR THE TRIAL OF THIS ACTION.

The convenience of the parties has been recognized as an element to be considered in considering the "fairness" test in *Hanson vs. Denckla,* 78 S.Ct. 1228, as well as *McGee vs. International Life Insurance Company,* 355 U.S. 220, and *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154. That the convenience of the parties, while not a substitute for jurisdiction, is a factor to be considered was also recognized by the Arizona Court in the *Phillips vs. Anchor Hocking Glass Corporation case,* infra, where the Court pointed out that the immobility of our lower economic class is well known, and that the Court should consider the nature

of the cause of action, including the applicable law and the practical matters of trial.

In this case (1) the accident occurred in Oklahoma; (2) the injuries were sustained in Oklahoma; (3) the law of Oklahoma would be applied to this case; (4) the witnesses to the accident, giving rise to plaintiffs' injuries, are in Oklahoma; (5) the hospital records and the treating physicians are in Oklahoma; and (6) the plaintiffs, at the time the suit was filed, was confined in the hospital in Oklahoma. If the case were tried in New York, against these defendants, all the witnesses, records, and exhibits would have to be taken to New York.

The trial of the action against the manufacturer and importer would still be in Oklahoma since they have not joined these defendants in challenging the jurisdiction of the Oklahoma courts.

Certainly, Oklahoma is the most convenient place to try this lawsuit. Six major airlines serve Tulsa, Oklahoma, and the only real connection that the State of New York has with this case is the fact that the car was sold there.

This is a case of extreme importance and great magnitude to the plaintiffs. This accident has been a most terrible tragedy to the family. Medical cost has pauperized the Robinsons. They cannot and they should not be forced to assume this extraordinary burden.

We respectfully submit the trial of the action against the manufacturer, Audi NSU Auto Union Aktiengesellschaft, and as against the importer, Volkswagen of America, Inc., would still be held in Oklahoma, since those defendants joined issue and admitted the jurisdiction of the Oklahoma Court. They have refused to join with petitioners in petitioners' Application for Writ of Certiorari. They had refused and did not join with these petitioners in the Application for a Writ of Prohibition to the Supreme Court of Oklahoma.

The trial of this action, in the opinion of counsel, may well exceed three or four weeks; the record will be voluminous and the costs staggering.

CONCLUSION

In virtually every case presented to this Court, from *McGee* to *Ajax Realty vs. Zook,* (cert den), defendants have insisted upon a return to the doctrine of *Pennoyer vs. Neff.* The charge is leveled that the application of the long-arm statute involved to the defendants in the particular case, extends the State Court jurisdiction beyond the constitutional limit and removes all bearers from exercising in personam jurisdiction in any case. This Court has readily rejected such argument and has consistently refused to return to *Pennoyer.*

The test is not that automobile dealers may be subjected to suit in particular cases, the test that this Court has established is does it offend "traditional notions of fair play and substantial justice."

This Court, some 25 years ago, discerned a trend toward expanding the prospective scope of state jurisdiction under foreign corporations and other nonresidents. This, the Court said, was attributable to a fundamental transformation on the American national economy under the years.

With the enormous increase of nationalized communications, interstate commerce transportation; with the enormous mobility of the American citizen, with some 400 million automobiles traveling transcontinental highways, it is well that the Court recognize that where dangerous and defective products are placed in the hands of innocent purchasers, there is in fact a greater responsibility which the manufacturer and seller of such an instrument must recognize.

It is a matter almost as simple as this. Either an un-

bearable burden must be placed upon the plaintiffs, or the defendant seller must recognize its responsibility.

Because the Defendants have entered a general appearance and the case is now moot, and because this Court has previously provided proper guidance for the state Courts through their decisions, and because the exercise of impersonam jurisdiction by the Oklahoma courts is clearly within the perimeter of due process, the writ should be denied.

Respectfully Submitted,

Jefferson G. Greer
206 Beacon Building
Tulsa, Oklahoma 74103

Charles A. Whitebook
1700 Fourth NBT Building
Tulsa, Oklahoma 74119

Of Counsel:
Greer & Greer
206 Beacon Building
Tulsa, Oklahoma 74103

APPENDIX

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY BRISTOW DIVISION,
STATE OF OKLAHOMA

No. C-77-100

KAY ELOISE ROBINSON,
Plaintiff,
vs.
VOLKSWAGEN OF AMERICA, INC.,
WORLDWIDE VOLKSWAGEN CORPORATION,
and SEAWAY VOLKSWAGEN, INC.,
Defendants.

SPECIAL APPEARANCE, DENIAL OF JURISDICTION AND VENUE

COMES NOW the defendant Worldwide Volkswagen Corporation, and hereby specially appears for the purpose of objection to jurisdiction and venue only in this cause upon the following grounds and reasons:

1. Defendant Worldwide Volkswagen Corporation is a foreign corporation, it is not authorized to do business in Oklahoma nor has it ever done business in Oklahoma, and it has never had any type of contact, or minimal contact with the jurisdiction of the State of Oklahoma.
2. The statutes of the State of Oklahoma and of the United States Constitution provide that in personam jurisdiction cannot be effected within the boundaries of the State of Oklahoma upon this defendant.
3. This Honorable Court does not have jurisdiction over the parties, nor venue of the subject matter.

4. Service of process has not been issued, executed, nor returned according to the statutes of the State of Oklahoma.

Defendant Worldwide Volkswagen Corporation further requests and respectfully asks this Honorable Court to set the issues of jurisdiction and venue for a hearing pursuant to Oklahoma Statutes Title 12, Section 189, so that this defendant can submit evidence to support this defendant's Special Appearance before the Court.

WHEREFORE, defendant Worldwide Volkswagen Corporation prays for an immediate hearing concerning the jurisdiction and venue of this Court, and further prays for a dismissal of the action commenced herein upon the grounds and reasons heretofore stated concerning the Court's total lack of jurisdiction of the parties, subject matter and venue hereto.

Authorities:
United States Constitution, 14th Amendment
Due Process Clause
Oklahoma Statutes, Title 12, Section 137
Okalhoma Statutes, Title 12, Section 163
Oklahoma Statutes, Title 12, Section 170.1
Oklahoma Statutes, Title 12, Section 170.8
Oklahoma Statutes, Title 12, Section 187
Oklahoma Statutes, Title 12, Section 189
Oklahoma Statutes, Title 12, Section 1701.02
Oklahoma Statutes, Title 12, Section 1701.03
Oklahoma Statutes, Title 12, Section 1702.01
Oklahoma Statutes, Title 18, Section 471

/s/ MIKE BARKLEY
Suite 702 Utica Tower
1924 South Utica
Tulsa, Oklahoma 74104
Telephone: 749-8846
Attorney for Defendant,
Worldwide Volkswagen Corporation

STATE OF OKLAHOMA
COUNTY OF TULSA } SS.

I, MIKE BARKLEY, state that I am the attorney for Worldwide Volkswagen Corporation, which is a foreign corporation and has no offices, directors, employees or agents within the State of Oklahoma; and that I verily believe that the contents of this Special Appearance Denial of Jurisdiction and Venue are true and correct.

/s/ MIKE BARKLEY

Subscribed and sworn to before me this 17th day of November, 1977.

Notary Public

My Commission Expires:
March 12, 1980

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing Special Appearance, Denial of Jurisdiction and Venue was deposited in the U.S. Mail this 17th day of November, 1977, addressed to plaintiffs' attorney, Jefferson G. Greer, 206 Beacon Building, Tulsa, Oklahoma 74103, with postage thereon fully prepaid.

Supreme Court, U. S.
FILED
FEB 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF OF PETITIONERS

MIKE BARKLEY
Attorney for Petitioner World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh
40 Wall Street
New York, New York 10005

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

—0—

WORLD-WIDE VOLKSWAGEN CORPORATION and
SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

—0—

REPLY BRIEF OF PETITIONERS

I

Respondents' contention that this case is moot is frivolous. Petitioners, in accordance with Oklahoma practice, have at all times contested the power of the State of Oklahoma to assert jurisdiction over them. This new argument and the similarly unfounded claim of dilatory tactics are in-

terposed solely to divert this Court's attention from the very real constitutional issue raised by the decision of the Supreme Court of Oklahoma.

II

Respondents' discussion of prior federal and state court cases, rather than supporting the decision of the Oklahoma Supreme Court, underscores the necessity of review by this Court. The apparently exhaustive examination by respondents of over fifteen years of federal and state "long-arm" decisions has produced only one isolated case, *Reilly* v. *Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1250 (D.N.J. 1974), in which a court exercised jurisdiction over a non-resident dealer solely upon the ground that the dealer should have foreseen his product being taken by his customer into a distant forum.

It is respectfully submitted that the *Reilly* case, to the extent it is consistent with the present decision of the Oklahoma court, places an unconstitutional burden on local sellers of consumer goods. Neither the Oklahoma case nor the *Reilly* decision can be reconciled with the cases cited by petitioners, nor with the decision by the State of Florida in *Jack Pickard Dodge, Inc.* v. *Yarbrough*, 352 So.2d 130 (Fla. Dist. Ct. App. 1977). This conflict or potential for conflict among federal and state courts over basic principles of personal jurisdiction reinforces petitioners' request that the question be resolved by this Court. The fact that thousands of retailers throughout the country sell locally thousands of transportable products highlights the importance of forestalling prospective violations of the constitutional principles enunciated by this Court.

III

In each case cited by respondents, other than *Reilly*, a manufacturer defendant had undertaken some purposeful activity in the forum state or had derived economic benefits from his products being sold in the forum or to its residents. In none of these cases was the mere happenstance of the accident in the forum sufficient to sustain jurisdiction.

Respondents assert that there are no jurisdictionally cognizable differences between sellers of goods at different levels. This is simply untrue. A multi-billion dollar manufacturer engaged in national distribution is vastly different from the single owner business which sells the manufacturer's products to local customers in a single community of a single state. "[A] given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 n.19 (1977).*

IV

Respondents argue that this Court's decision in *Hanson* v. *Denckla*, 357 U.S. 235 (1958), no longer provides the framework for evaluating and determining the constitutional reach of state "long-arm" statutes. Despite Justice Goldberg's admonition in *Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1, 15 L.Ed.2d 39 (1965), that *Hanson* meant what it said, and requires in every instance a defendant to have "taken voluntary action calculated to have an effect

---

* As the Michigan Supreme Court has recently indicated, not even all manufacturers are to be treated alike. *Hapner* v. *Rolf Brauchli, Inc.*, 47 U.S.L.Week 2462 (Jan. 23, 1979). A small local manufacturer, selling to only two or three independent wholesalers, is not to be treated in the same manner as a vast manufacturing enterprise which has established a comprehensive franchise network.

in the forum state'' (86 S.Ct. at 4, 15 L.Ed.2d at 44), federal and state courts, as respondents' point out, have fashioned alternative tests of jurisdiction, which either eviscerate or ignore the *Hanson* mandate. This Court's recent reinforcement of jurisdictional boundaries in *Shaffer* shows that unconstitutional tests developed elsewhere must be abated. Only this Court can now rectify Oklahoma's unconstitutional result.

V

The term ''stream of commerce'' has an alluring quality surrounding it. To respondents, it is a powerful talisman which when incanted by them allegedly creates the requisite nexus between petitioners and Oklahoma. However, it is neither the constitutional test nor the factual basis in this case. If there is a thread connecting petitioners to Oklahoma, it was spun by the Robinsons, by their voluntary and intentional decision to travel through that state on their way to Arizona. This unilateral act does not supply the nexus required. *Hanson* v. *Denckla, supra,* 357 U.S. at 253.

VI

Questions relating to substantive liability, *forum non conveniens* and choice of law do not provide the basis for decision of the fundamental jurisdictional issue. For this, the courts must look solely to the acts of the defendant.

> ''[The State] does not acquire * * * jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants].'' *Hanson* v. *Denckla, supra,* 357 U.S. at 254; *Shaffer* v. *Heitner, supra,* 433 U.S. at 215.

Conclusion

Respondents' brief confirms the existence in this case of important constitutional questions of personal jurisdiction that require review. The petition for a writ of certiorari should be granted.

Respectfully submitted,

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner
Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK,
GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh
40 Wall Street
New York, New York 10005

Supreme Court, U. S.
FILED
APR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR PETITIONERS

MIKE BARKLEY
Attorney for Petitioner World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh
40 Wall Street
New York, New York 10005

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Constitutional Provision and Statute Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	5
ARGUMENT:	
The Exercise of *In Personam* Jurisdiction by an Oklahoma Court over a Local New York Retailer and his New York Regional Distributor, Based Solely on Injury in Oklahoma as a Result of the Transient Presence in that State of the Retailer's New York Customer and the Product He Purchased in New York, Violates the Due Process Clause of the Fourteenth Amendment	6
A. Oklahoma Has No Basis for Jurisdiction, Since Petitioners Did Not Avail Themselves of the Privilege of Conducting Activities in Oklahoma	6
B. Jurisdiction Cannot Be Constitutionally Sustained Solely on the Basis of the Foreseeability of a Possibility that a Purchaser Might Fortuitously Travel through Oklahoma and Might Be Involved in an Accident	8
C. Previous State and Lower Federal Court Decisions Articulate the Inherent Impropriety in Requiring a Seller To Defend in a Forum Where He Does Not Market His Wares or Engage in Other Economic Activity	9
D. Contrary To This Court's Holding in *Hanson*, Which Was Reaffirmed in *Shaffer* and *Kulko*, the Decision of the Oklahoma Supreme Court Shatters All Restrictions on the Personal Jurisdiction of State Courts over Localized Out of State Sellers	11
CONCLUSION	12

Table of Cases Cited

	PAGE
Easterling v. *Cooper Motors, Inc.* 26 F.R.D. 1 (M.D.N.C. 1960)	10
Erlanger Mills v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956)	11
Granite States Volkswagen, Inc. v. *District Court*, 177 Colo. 42, 492 P.2d 624 (1972)	10
Hanson v. *Denckla*, 357 U.S. 235 (1958)	6, 7, 8, 11
Hapner v. *Rolf Brauchli, Inc.*, 404 Mich. 160, 273 N.W. 2d 822 (1978)	7
Hutson v. *Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978)	7
In-Flight Devices Corp. v. *Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972)	7
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)	6
Jack Pickard Dodge, Inc. v. *Yarbrough*, 352 So.2d 130 (Fla. Dist. Ct. App. 1977)	10
Kerrigan v. *Clarke Gravely Corp.*, 71 F.R.D. 480 (M.D. Pa. 1975)	10
Kulko v. *Superior Court*, 436 U.S. 84 (1978)	6, 7, 8, 11
Lisoni v. *Dave Cole Pontiac, Inc.*, 52 Cal. App. 3d 445, 125 Cal. Rptr. 120 (1975)	10
O'Brien v. *Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963)	7
Oliver v. *American Motors Corp.*, 70 Wash. 2d 875, 425 P.2d 647 (1967)	9
Pellegrini v. *Sachs & Sons*, 522 P.2d 704 (Utah 1974)	9
Shaffer v. *Heitner*, 433 U.S. 186 (1977)	7, 11
Tilley v. *Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968)	10
Uppgren v. *Executive Aviation Services, Inc.*, 304 F.Supp. 165 (D. Minn. 1969)	12

Constitutional Provision and Statutes Cited

	PAGE
Oklahoma Statutes, title 12, section 1701.03(a) (4)	2
United States Constitution, Fourteenth Amendment, section 1	2
28 U.S.C., section 1257 (3)	2

Other Authorities Cited

Comment, *Tortious Act As a Basis for Jurisdiction in Products Liability Cases*, 33 Fordham L. Rev. 671 (1965)	11
Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533	11
Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61 (1965)	11
Note, *Recent Developments—Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute*, 66 Colum. L. Rev. 199 (1966)	11
Note, *Developments in the Law, State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960)	11
Note, *A Reconsideration of "Long Arm" Jurisdiction*, 37 Indiana L.J. 334 (1962)	7
Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 Cornell L.Q. 196 (1957)	6
Twerski, *A Return to Jurisdictional Due Process—The Case for the Vanishing Defendant*, 8 Duquesne L. Rev. 220 (1970)	7

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and
SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Oklahoma Supreme Court, not yet reported, appears in the Appendix (1a-6a) to the petition for a writ of certiorari.* No opinion was rendered by the lower court, the District Court of Creek County, Oklahoma.

---

* Abbreviated hereinafter as "Cert. Pet. App." Citations to pages of the Appendix filed with this Court pursuant to Rule 36 are preceded by the letter "A."

Jurisdiction

On October 10, 1978, the Oklahoma Supreme Court denied petitioners' application for a writ of prohibition and held that the State of Oklahoma may exercise *in personam* jurisdiction over petitioners in this case. The petition for a writ of certiorari was filed on January 5, 1979 and the writ was granted on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision and Statute Involved

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution and the Oklahoma "long arm" statute.

Section 1 of the Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> "No State shall * * * deprive any person of life, liberty or property, without due process of law * * *."

The Oklahoma Statutes, tit. 12, §1701.03, in pertinent part, provides:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:
>
> * * *
>
> (4) causing tortious injury in this state by an act or omission outside this state if he * * * derives substantial revenue from goods used or consumed or services rendered, in this state."

Question Presented

Whether the exercise by the State of Oklahoma of personal jurisdiction over a New York retailer and his New York wholesale supplier is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution where (1) it is based solely on injury in Oklahoma resulting from the fortuitous transient presence in that state of the retailer's New York customer and the product he purchased in New York and (2) the retailer and the wholesaler neither engaged in any business, economic or other activity in, or directed toward, Oklahoma or Oklahoma residents, nor had any other relationship with Oklahoma or Oklahoma residents.

Statement of the Case

On December 15, 1976, Harry Robinson, a New York resident, purchased an Audi automobile from Seaway Volkswagen, Inc. ("Seaway"), a local Audi dealer in Massena, New York. In September 1977, Mr. Robinson and his wife and children were travelling through Oklahoma, on their way to Arizona, when the Audi automobile, which was being driven by Mrs. Robinson, collided with another vehicle. The Robinsons initiated a suit in Oklahoma alleging manufacturing and design defects in the Audi vehicle, suing both Audi N.S.U. Auto Union Aktiengesellschaft, the German manufacturer of the car, and Volkswagen of America, Inc., the importer of the vehicle. Also named in the suit were Seaway and Seaway's supplier, World-Wide Volkswagen Corporation ("World-Wide"), a New York wholesale distributor which sells Audi and other vehicles to local dealers in New York, New Jersey and Connecticut (A. 22).

Neither Seaway nor World-Wide has ever done any business in Oklahoma and neither has ever derived any revenue from economic activities related to Oklahoma. The business activities of Seaway and World-Wide are, by their very nature, confined to their local areas. They do not advertise their products in any national magazine or on any television or radio network and they do not participate in any advertising fund or pool placing advertisements in or which reach Oklahoma (A. 16, 18-19). Oklahoma is simply outside the economic sphere in which Seaway and World-Wide operate.

Completely lacking contacts with Oklahoma, Seaway and World-Wide moved to dismiss the Robinsons' action on the ground that the assumption of jurisdiction over them by the State of Oklahoma would violate the Due Process Clause of the Fourteenth Amendment. Following a denial of their motion by the Oklahoma District Court, Seaway and World-Wide petitioned to restrain the district court judge, the Hon. Charles S. Woodson, from exercising jurisdiction, again contending that the Due Process Clause precluded Oklahoma from subjecting them to its jurisdiction (A. 29, 32).

On October 10, 1978, the Oklahoma Supreme Court denied the writ of prohibition, concluding that personal jurisdiction over petitioners could be exercised under the Oklahoma "long arm" statute, because each of the petitioners "derives substantial revenue from goods used * * * in this State." Okla. Stat., tit. 12, § 1701.03(a)(4). From the use by the Robinsons of the car in Oklahoma, the court believed it was "reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma" (Cert. Pet. App. 6a).

The Oklahoma Supreme Court acknowledged that a determination of long-arm jurisdiction necessitates an inquiry into "whether such exercise of jurisdiction is consistent with the constitutional requirements of due process" (Cert. Pet. App. 2a), as well as an analysis of state statutory provisions. Yet the court never specifically commented on its conclusions with respect to this threshold inquiry. Presumably, the court decided that the constitutional requirements were satisfied by the fact that "the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma" (Cert. Pet. App. 6a).

Summary of Argument

Oklahoma is not a permissible forum for the litigation between the Robinsons and petitioners. The presence of the accident vehicle in Oklahoma stemmed from the voluntary and unilateral post-sale decision by the Robinsons to travel through that state. Neither Seaway, the Massena, New York retailer from whom Mr. Robinson purchased the car, nor World-Wide, the regional wholesaler who supplied the vehicle to Seaway, competes for sales in the Oklahoma marketplace. Nor do Seaway and World-Wide have any other contacts with the State of Oklahoma. In the absence of any purposeful economic efforts or commercial activity directed toward Oklahoma or its residents by petitioners, mere foreseeability that a vehicle, sold in New York to a New Yorker, may one day enter Oklahoma is not constitutionally sufficient to justify the exercise of *in personam* jurisdiction over petitioners by the State of Oklahoma.

ARGUMENT

The Exercise of *In Personam* Jurisdiction by an Oklahoma Court over a Local New York Retailer and his New York Regional Distributor, Based Solely on Injury in Oklahoma as a Result of the Transient Presence in that State of the Retailer's New York Customer and the Product He Purchased in New York, Violates the Due Process Clause of the Fourteenth Amendment.

A. Oklahoma Has No Basis for Jurisdiction, Since Petitioners Did Not Avail Themselves of the Privilege of Conducting Activities in Oklahoma.

Before a person can become subject to *in personam* jurisdiction, he must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958); *Kulko* v. *Superior Court*, 436 U.S. 84, 94 (1978).

This essential element is completely absent in this case.

Where, as here, the localized seller's marketing area is distant and distinct from the forum state, and that state is not the focus or target of any purposeful acts by the seller, it becomes unfair and unreasonable, in the context of our federal system of government, for the seller to be called upon to defend in the forum state. *See*, Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 Cornell L.Q. 196 (1957); Twerski, *A Return to Jurisdictional Due Process—The Case for the Vanishing Defendant*, 8 Duquesne L. Rev. 220 (1970); Note, *A Reconsideration of "Long-Arm" Jurisdiction*, 37 Indiana L.J. 334 (1962). Even in the case of a manufacturer, if the introduction of the product into the forum state is not attributable to the calculated efforts of the manufacturer to exploit the forum market, the manufacturer cannot be deemed to have invoked the benefits of the laws of the forum state. *Hutson* v. *Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978); *Hapner* v. *Rolf Brauchli, Inc.*, 404 Mich. 160, 273 N.W.2d 822 (1978); *O'Brien* v. *Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963).

In this case there is not even the remotest activity directed to the exploitation of a market in the forum state, and no economic gain by reason of any purposeful activity in that state. The only contact among the parties, the forum and the litigation resulted entirely from the Robinsons' decision to pass through that state. To require Seaway and World-Wide to defend in Oklahoma in the absence of any activities by them is necessarily unfair and unreasonable. *Kulko* v. *Superior Court, supra*, 436 U.S. at 93-94; *Shaffer* v. *Heitner*, 433 U.S. 186, 204, 215-216 (1977); *Hanson* v. *Denckla, supra*, 357 U.S. at 253; *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220, 226, 228 (6th Cir. 1972).

B. Jurisdiction Cannot Be Constitutionally Sustained Solely on the Basis of the Foreseeability of a Possibility that a Purchaser Might Fortuitously Travel Through Oklahoma and Might Be Involved in an Accident.

The finding of the Oklahoma Supreme Court that an Oklahoma accident was a foreseeable consequence of the sale by the Massena retailer to a local resident is a constitutionally impermissible basis for assuming jurisdiction over petitioners. Foreseeability, without more, is not constitutionally equivalent to the test of *International Shoe.*

That a New York purchaser of an automobile from a New York dealer may, one day, travel in that car to another state, cannot of course be excluded from the realm of possible foreseeability. Indeed, it is foreseeable that any purchaser of any consumer product may choose to take that product out of the state of purchase. If foreseeability alone were sufficient, every local seller would be subject to suit in every state in which the product he sold happens to be brought by the purchaser.

Foreseeability must be coupled with the requisite "affiliating circumstances" before it is reasonable and fair for a state to subject a person to its jurisdiction. *Hanson* v. *Denckla, supra,* 357 U.S. at 246; *Kulko* v. *Superior Court, supra,* 436 U.S. at 92. These affiliating circumstances are not present where the seller does not purposefully avail himself of the benefits of the forum state, either through sales in that state-or through intentional efforts to reach that state's market and thereby generate revenue from sales to residents of that state.

C. Previous State and Lower Federal Court Decisions Articulate the Inherent Impropriety in Requiring a Seller To Defend in a Forum Where He Does Not Market His Wares or Engage in Other Economic Activity.

In *Oliver* v. *American Motors Corp.,* 70 Wash.2d 875, 425 P.2d 647 (1967), the plaintiff, a resident of Oregon, purchased a vehicle from an Oregon dealer. He subsequently went on a trip to the State of Washington, where he was overcome by gaseous fumes emanating from the car's exhaust system. The Supreme Court of Washington held that the exercise of long-arm jurisdiction was unconstitutional.

> "To attach personal jurisdiction because * * * the out-of-state purchaser brings the offending mechanism into this state and a tortious consequence occurs is so slender and tenuous a thread upon which to hang the implication of submission to our jurisdiction, that in our judgment it does indeed offend 'traditional notions of fair play and substantial justice' within the contemplation of the due process clause." 70 Wash.2d at 889, 425 P.2d at 656.

In *Pellegrini* v. *Sachs & Sons,* 522 P.2d 704 (Utah 1974), the plaintiff, a California resident, after purchasing an automobile from a local California dealer, moved to Utah, where he was involved in a collision. The exercise of long-arm jurisdiction over the California dealer was held unconstitutional.

> "While it is true that [a dealer] may reasonably expect that the car will go into other states, that does not seem overly important. The counterpoint is that it is also to be expected that most of the products he sells will be used where he is (in California) most of the time; and that even if one does

leave, it will likely return, so that in the great preponderance of instances, the discharge of his duties as to the product will be where he is. It is more significant to note that he does not go into the foreign state to take advantage of its business climate or the protection of its laws." 522 P.2d at 707.

Again in *Tilley* v. *Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968), the court refused, on constitutional grounds, to permit jurisdiction over an out of state truck dealer who sold the vehicle in Colorado to a Colorado resident.

> "[T]here must be something more in 'product hazard' cases than a foreseeable injury from the product to fulfill the minimum contact requirement of due process." 200 Kan. at 648, 438 P.2d at 133.

Similarly, the Supreme Court of Colorado, in *Granite States Volkswagen, Inc.* v. *District Court*, 177 Colo. 42, 492 P.2d 624 (1972), refused to exercise long-arm jurisdiction over a New Hampshire dealer who sold a car in New Hampshire to a person who subsequently moved to and had an accident in Colorado. Without a showing of any "voluntary action calculated to have an effect" in Colorado, there was no constitutional basis for *in personam* jurisdiction over the dealer in Colorado. 177 Colo. at 45, 492 P.2d at 625-626. *See also, Kerrigan* v. *Clarke Gravely Corp.*, 71 F.R.D. 480 (M.D. Pa. 1975); *Easterling* v. *Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960); *Jack Pickard Dodge, Inc.* v. *Yarbrough*, 352 So.2d 130 (Fla. Dist. Ct. App. 1977); *Lisoni* v. *Dave Cole Pontiac, Inc.*, 52 Cal. App. 3d 445, 125 Cal. Rptr. 120 (1975).

D. Contrary To This Court's Holding in *Hanson*, Which Was Reaffirmed in *Shaffer and Kulko*, the Decision of the Oklahoma Supreme Court Shatters All Restrictions on the Personal Jurisdiction of State Courts Over Localized Out of State Sellers.

Hanson emphasized the fundamental restrictions on state courts in assuming *in personam* jurisdiction over litigants. These restrictions are "more than a guarantee of immunity from inconvenient or distant litigation." 357 U.S. at 251. As this Court stated: "They are a consequence of territorial limitations on the power of the respective States." *Ibid.*

The disregard by the Oklahoma Supreme Court of this admonition, which was reaffirmed in *Shaffer* v. *Heitner, supra*, 422 U.S. at 203-204 n.20, 216, and *Kulko* v. *Superior Court, supra*, 436 U.S. at 101, requires reversal of the decision below.

Under the rubric of the Oklahoma Supreme Court, every automobile dealer, every retail seller of tires* and, indeed, every retailer or local distributor of consumer products of

---

* The burdens imposed upon a local tire retailer, who would be amenable to suit in any state where his customer happened to be involved in an accident attributable to the tire, is the subject of Judge Sobeloff's often cited hypothetical in *Erlanger Mills* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956).

The constitutional issues raised by Judge Sobeloff's hypothetical are the subject of extensive academic commentary. *See*, Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 556, 559; Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61, 75, 82 (1965); Note, *Recent Developments—Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute*, 66 Colum. L. Rev. 199, 206-208 (1966); Note, *Developments in the Law, State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 929-930 (1960); Comment, *Tortious Act As a Basis for Jurisdiction in Products Liability Cases*, 33 Fordham L. Rev. 671, 702-705 (1965).

every nature would be required to defend a suit wherever the products he sells may become involved in an accident.* This would be so despite the complete lack of contact with the forum state and the total absence of any economic benefit from purposeful activity directed toward the forum state.

The assertion of Oklahoma's judicial jurisdiction over petitioners does not comport with due process of law simply because Seaway and World-Wide have nothing to do with the State of Oklahoma.

CONCLUSION

For all the reasons set forth, petitioners' request that this Court reverse the Oklahoma Supreme Court's denial of a writ of prohibition and direct that the writ be issued, prohibiting the respondent trial judge from exercising personal jurisdiction over petitioners.

Respectfully submitted,

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen
Corporation

DAN A. ROGERS
Attorneys for Petitioner
Seaway Volkswagen, Inc.

Of Counsel:
HALL, ESTILL, HARDWICK,
GABLE, COLLINGSWORTH
& NELSON
ROGERS, ROGERS & JONES
HERZFELD & RUBIN, P.C.
Herbert Rubin
Bernard J. Wald
Ian Ceresney
Howard S. Edinburgh

---

* *See, Uppgren* v. *Executive Aviation Services, Inc.*, 304 F.Supp. 165, 170-171 (D.Minn. 1969), where the court postulates the possible requirement of a roadside seller of soft drinks in Florida defending a suit in Alaska simply because the Alaskan purchaser bought the bottle in Florida, returned to his home state and gave it to his child, who drank its contents and became ill. Here, where the purchaser was not even a resident of the forum state, the inequity of such a result is even greater.

Supreme Court, U.S.
FILED
MAY 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

World-Wide Volkswagen Corporation and
Seaway Volkswagen, Inc.,
Petitioners

v.

The Honorable Charles S. Woodson, District Judge of
Creek County, State of Oklahoma, Kay Eloise Robinson,
Eva May Robinson, a minor, by and through her father
and next friend, Harry Robinson, George Samuel Robinson,
a minor, by and through his father and next friend,
Harry Robinson, and Harry Robinson, individually,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT

Jefferson G. Greer
206 Beacon Building
Tulsa, Oklahoma 74103

Charles A. Whitebook
1700 Fourth NBT Building
Tulsa, Oklahoma 74119

ATTORNEY FOR RESPONDENTS

Of Counsel:
Greer & Greer
206 Beacon Building
Tulsa, Oklahoma 74103

TYPE SERVICE CO., Law Brief Printing Division, 507 S. Quaker, Tulsa, OK 74120 (918) 587-2052

INDEX

Page

Opinion Below 1

Jurisdiction 1

Constitutional Provision and Statute Involved 2

Question Presented 2

Statement of the Case 2

Argument: *The exercise of in personam jurisdiction by an Oklahoma court over a New York seller of a defective automobile which causes injury to its purchaser while being used in Oklahoma, is constitutionally permissible under the due process clause of the fourteenth amendment.* 4

A. Oklahoma has a clear basis for jurisdiction since it has a clear interest in providing a forum for persons injured within its boundaries because of potential medical creditors, presence of witnesses, and other evidence. 4

B. The exercise of jurisdiction by Oklahoma courts meets the traditional notions of fair play and substantial justice. 16

C. The Oklahoma courts is the most convenient forum for the trial of this action. 20

D. This matter is moot because the defendants have entered a general appearance. 22

Table of Cases

Ada Dairy Products vs. Superior Court of Seminole County, 258 P.2d 939 (Okl. 1953) 23

Ajax Realty Corporation vs. J. F. Zook, Inc., (CA 4 Va), 493 F.2d 818, cert den, 411 U.S. 966, 36 L.Ed.2d 687, 93 S.Ct. 2148 ..... 12, 23

Anderson vs. National Presto Industries, Inc., 135 N.W.2d 639 (Iowa 1965) 13

Atkins vs. Jones and Laughlin Steel Corporation, 104 N.W.2d 888 (Minn. 1960) 13

Buckeye Boiler Company vs. Superior Court, 458 P.2d 57 (Cal. 1969) 17

Buckeye Builder Company vs. Superior Court, 458 P.2d 57 (Cal. 1969) 17

Carmack vs. Chemical Bank New York Trust Company, 536 P.2d 895, (Okl. 1975) 15

Clay vs. Sun Insurance Company, 376 U.S. 179 17

Crose vs. Volkswagenwerk Aktiengesellschaft, 558 P.2d 764 (1977) 9

Dunnigan vs. A. H. Robins Company, 559 P.2d 750 (Idaho 1977) 8

Fields vs. Volkswagen of America, Inc. 555 P.2d 48, 84 A.L.R.3d 1199 (Okl. 1976) 12, 15

Fisher Governor vs. Superior Court, 347 P.2d 1 (Cal. 1959) 17

Golden Gate Hop Ranch, Inc., vs. Velsicol Chemical Corporation, 403 P.2d 351, (Wash. 1965), cert den, 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 539 12

Gonzales vs. Harris Calorific Company, 64 Misc.2d 287, 315 N.Y. Supp.2d 51, aff'd 35 App.Div.2d 720, 315 N.Y.Supp.2d 815 14

Gray vs. American Radiator and Standard Sanitary Corporation, 176 N.E.2d 761 (Ill. 1961) .. 12, 7

Hanson vs. Denckla, 357 U.S. 253, 78 S.Ct. 1240, 2 L.Ed.2d 1298, 78 S.Ct. 1228 ..... 9, 10, 11, 19, 20

Harford vs. Smith, (119 66 D.C.W.Va.), 257 F.Supp. 578 13

Hines vs. Clendenning, 465 P.2d 460 (Okl. 1970) 15

Houghton vs. Piper Aircraft Corporation, 542 P.2d 24 (Ariz. 1975) 19

Hutchinson vs. Body & Sons Press Sales, Inc., 188 F.Supp. 876 (D.C.D.Mindd. 1960) 13

International Shoe Company vs. State of Washington, 326 U.S. 310, 66 S.Ct. 154 90 L.Ed.2d 95 (1945) 5, 8, 9, 12, 20

Jameson vs. Harvel, 280 P. 1080 (Okl. 1929) 22, 23

Kimball vs. Kimball, 174 U.S. 158, 43 L.Ed. 932, 19 S.Ct. 639 23

Kulko vs. Superior Court of California, 98 S.Ct. 1690 (1978) 10, 11, 17, 19

Little vs. Bowers, 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620 23

McCoy vs. Wean United, Inc., 67 F.R.D. 491 (D.C. Tenn.) 7

McGee vs. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) 8, 12, 17, 20, 23

Metal Matic, Inc. vs. Eighth Judicial District Court, 415 P.2d 617, (Nev. 1966) 14

Mulane vs. Central Hanover Bank & Trust Company, 339 U.S. 306 17

Painter vs. Home Finance Company, 96 S.E.2d 731 13

Pegler vs. Sullivan, 432 P.2d 593 (Ariz. 1967) 17

Phillips vs. Anchor Hocking Glass Corporation, 413 P.2d 732, (Ariz. 1966) annotated at 19 A.L.R.3d 1 ..... 8, 9, 17, 20

Page

Reilly vs. Phil Tolkan Pontiac, Inc.,
372 F.Supp. 1205 (U.S.D.C.-D.N.J. 1974) . 4, 5, 6, 7, 15

Roche vs. Floral Rental Corporation,
95 N.J.Super. 555, 232 A.2d 162
(App.Div. 1967 ..... 5, 6

Rosenblatt vs. American Cyanamid Company,
86 S.Ct. 1, (1965)..... 12

Severson vs. Home Owners Loan Corporation,
88 P.2d 344 (Okl. 1939)..... 22

Shaffer vs. Heitner, 433 U.S. 186 ..... 10, 11

Smyth vs. Twin State Improvement Corporation,
80 A.2d 664, 25 A.L.R.2d 1193..... 13

Texair Fliers, Inc. vs. District Court,
First Judicial District, 506 P.2d 367 (Col.) 14

Urlinger Mills, Inc. vs. Cohoes Fiber Mills, Inc.,
239 F.2d 502 (4th Cir. 1956) 9, 20

Webster vs. Crump,
246 P. 423 (Okl. 1926)..... 22

Other Authorities Cited

Appearance,
5 Am.Jur.2d, Section 21, page 496, 497 ..... 22, 23

Cleary, The Length of the Long-Arm,
9 Journal of Public Law 293 10

Currie, The Growth of the Long Arm,
1963 U.Ill.Law Forum 515, 540..... 13

R. Cramton, D. Curie, and H. Kay,
Conflict of Laws, 556 (2d Ed. 1975) 17

Federal Practice and Procedure,
§252, p. 720, 32 Am.Jur.2d 23

Uniform Interstate and International
Procedure Act, 12 O.S. (1971)
Section 1701.01, et seq..... 15

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

World-Wide Volkswagen Corporation and
Seaway Volkswagen, Inc.,
Petitioners

v.

The Honorable Charles S. Woodson, District Judge of
Creek County, State of Oklahoma, Kay Eloise Robinson,
Eva May Robinson, a minor, by and through her father
and next friend, Harry Robinson, George Samuel Robinson,
a minor, by and through his father and next friend,
Harry Robinson, and Harry Robinson, individually,
Respondents

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA**

Opinion Below

The opinion of the Oklahoma Supreme Court, not yet reported, appears in the Appendix to petitioners' brief (1a-6a). The District Court of Creek County, Oklahoma, the lower court, rendered no opinion.

Jurisdiction

The basis for this Court's jurisdiction is properly stated in petitioners' brief and will not be repeated here.

Constitutional Provision and Statute Involved

These provisions and the statute involved are correctly stated in petitioners' brief and are not repeated here.

Question Presented

The question presented is whether the State of Oklahoma may exercise in personam jurisdiction over a New York seller of a defective automobile where the use of the automobile by the purchaser, while in Oklahoma, causes injury to the user.

Statement of the Case

Harry Robinson, a New York resident, and his wife, Kay Eloise Robinson, purchased an Audi automobile from Seaway Volkswagen, Inc., ("Seaway"), in Massena, New York on December 15, 1976.

The Audi automobile in question was manufactured by Audi NSU Auto Union Aktiengesellschaft in Germany. It was thereafter imported into the United States by Volkswagen of America, Inc., who is the distributor for all of the United States for all Volkswagen products, including Audi automobiles. Volkswagen of America, Inc. then sold and delivered the Audi automobile to the defendant distributor, World-Wide Volkswagen Corporation ("World-Wide"), who in turn sold and distributed this vehicle to ("Seaway") in Messena, New York. Defendant ("World-Wide") is a New York corporation, as is ("Seaway").

Both Volkswagen of America, Inc., and Audi NSU Auto Union Aktiengesellschaft are subsidiaries of Volkswagen of Germany. ("World-Wide") is the Audi distributor for the states of New York, New Jersey, and Connecticut. According to their published list of distributors and dealers, Volkswagen of America, Inc. has seven exclusive regional distributors located throughout the

United States. There are several hundred Audi dealerships throughout the United States and Canada, with Audi dealers in every state of the union, including Alaska and Hawaii, and including four in the State of Oklahoma. Their literature shows 24 dealerships within the State of New York alone, with 12 dealerships located in New Jersey, and 8 located in the State of Connecticut.

On the 21st day of September, 1977, Mr. Robinson, accompanied by his wife and children, was travelling near Sapulpa, Oklahoma, on the Turner Turnpike (I-44) which parallels old U.S. Highway 66 from Tulsa to Oklahoma City, when his Audi automobile was rear ended by another vehicle, resulting in a fire and holocaust as a result of the design and placement of the gas tank and the fuel system on the Audi automobile, which resulted in mutilating and disabling injuries to his wife and two children.

Plaintiff's wife and children were subsequently hospitalized at Tulsa, Oklahoma, for over five months, during which time plaintiffs filed suit against the defendant manufacturer, Audi NSU Auto Union Aktiengesellshaft; the importer, Volkswagen of America, Inc.; the distributor, World-Wide Volkswagen Corporation; and the local Audi dealer, Seaway Volkswagen, Inc.

All the defendants first sought to remove the action filed in Creek County District Court of Oklahoma, to the United States District Court for the Northern District of Oklahoma. The United States District Court for the Northern District of Oklahoma determined that plaintiffs, since they were in transit to a new home in Arizona, were still residents of New York, and that there was no diversity of citizenship between the plaintiffs and New York defendants, and therefore no basis for their jurisdiction. The case was remanded to the District Court of Creek County, Oklahoma, and thereafter the defendants sought a writ of prohibition in the Supreme Court of the State of

Oklahoma. The defendant manufacturer and distributor did not join in this petition for Writ of Prohibition.

On October, 10, 1978, the Oklahoma Supreme Court denied the writ of prohibition, holding that the District Court of Creek County could exercise jurisdiction under the Oklahoma's "Long-Arm" Statute, a "single act" statute, because, under the circumstances of the case, and under the evidence adduced in the Trial Court, it was established that the petitioners "derived substantial revenue from goods used in the State of Oklahoma." Oklahoma Statute, Title 12, Section 1701.03(a) (4).

The petitioners then filed a Petition for Writ of Certiorari in this Court.

ARGUMENT:

THE EXERCISE OF IN PERSONAM JURISDICTION BY AN OKLAHOMA COURT OVER A NEW YORK SELLER OF A DEFECTIVE AUTOMOBILE WHICH CAUSES INJURY TO ITS PURCHASER WHILE BEING USED IN OKLAHOMA, IS CONSTITUTIONALLY PERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. OKLAHOMA HAS A CLEAR BASIS FOR JURISDICTION SINCE IT HAS A CLEAR INTEREST IN PROVIDING A FORUM FOR PERSONS INJURED WITHIN ITS BOUNDARIES BECAUSE OF POTENTIAL MEDICAL CREDITORS, PRESENCE OF WITNESSES, AND OTHER EVIDENCE.

This is not the first occurrence of this nature that has been considered by the District Courts of the United States.

In *Reilly vs. Phil Tolkan Pontiac, Inc.*, 372 F.Supp. 1205 (U.S.D.C.-D.N.J. 1974) a diversity action was instituted in the United States District Court for the District of New Jersey, against a Wisconsin automobile dealer for injuries sustained as a result of a defective jack which the defendant automobile dealer had sold to plaintiff in Wisconsin. Subsequently, plaintiff moved to New Jersey, where he sustained injury as a result of the defective jack.

The defendant, in the *Reilly* case, contended that the New Jersey Court did not have, under the doctrine of *International Shoe Company vs. State of Wisconsin,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the "minimum contacts" with the State of New Jersey to bring the defendant within the court's diversity jurisdiction.

The Court noted that New Jersey's long-arm statute allowed **service to the uttermost limits permitted by the United States Constitution.** The Court went on to state that the New Jersey Courts have steadily allowed the extension of state long-arm jurisdiction in cases involving defective items sold in the general flow of commerce. The New Jersey Court cited a long list of cases allowing jurisdiction to be exercised under the long-arm statute, and particularly cited *Roche vs. Floral Rental Corporation,* 95 N.J.Super. 555, 232 A.2d 162 (App.Div. 1967), where suit was brought against a New York corporation that installed a refrigerator body in a truck owned by a company doing business in New York, where the truck was delivered to the owner in New York. The truck subsequently traveled in New Jersey, and there was an accident in which the refrigerator body's design was a contributing factor. The defendant there claimed that there was not sufficient contacts to allow jurisdiction under the New Jersey Court.

In the *Roche* case, the Court cited Restatement, Conflict of Laws 2d, Section 37 (May 2, 1967), which provides:

"A state has power to exercise judicial jurisdiction

over an individual who causes effects in the state by an act done elsewhere with respect to causes of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

The Court, in the *Roche* case, further cited the discussion of Section 37, as follows:

"[Jurisdiction is valid where]: (1) the act was done with the intention of causing effects in the state; (2) the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and [invalid where] (3) the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so."

The Court, in the *Roche* case, further pointed out that the use of a product in New Jersey was deemed to have been reasonably foreseeable, in view of the fact that much of the traffic from the New York City area to the rest of the country would normally pass through New Jersey.

The Court, in the *Reilly* case, adopted the holdings in the *Roche* case and held that it was not unreasonable to assume that defendant dealer should have anticipated that the Pontiac it sold to plaintiff and the jack within it would come to be used in other states, including New Jersey. The Court stated:

"Automobiles are items that by their nature, and by the driving habits of Americans, commonly traverse long distances. Tolkan (dealer) knew that it was selling a product that is distributed, and for which spare parts are available, throughout the nation. Further, the car sold to plaintiff in 1967 was a 1966 model, presumably with several years and much mileage remaining in its useful life. Tolkan is located in a major

metropolitan area, which reflects the mobile patterns of modern society. Thus, Tolkan should be prepared to defend on alleged defects in the product it sold which had consequences in New Jersey."

The *Reilly* case is certainly analogous to the present case under consideration where the defendant distributor, with 44 dealers throughout three heavily populated states, could certainly anticipate cross-country travel on Route 66, the most heavily traveled inter-continental route, which runs through Oklahoma. It is therefore reasonable for them to have anticipated that their products distributed in interstate commerce would be used and substantial revenue derived from the goods used in Oklahoma.

Furthermore, since defendants' list of authorized Audi dealers show that Oklahoma has four dealerships, two of which are located on Route 66 in Tulsa and Oklahoma City, it is reasonable to believe that eastern travelers in Audi automobiles traveling cross-country would certainly seek service in Oklahoma, with their Audi automobiles. As for the retail dealer Seaway, since it is located in a state which is the second most populated state in the United States, it too could reasonably anticipate the use of Audi automobiles in Oklahoma.

It can hardly be questioned that the fairness test is satisfied where the marketing channels bring the goods into the forum, so it is only a short step in logic to conclude that the "fairness" test it met when the customer himself, in the possession of a product mobile by its very nature, brings the product into the forum state himself and is using it for the intended purpose. Frumer and Friedman Products Liability, Section 4501. [Emphasis ours]

In *McCoy vs. Wean United, Inc.*, 67 F.R.D. 491 (D.C. Tenn), a manufacturer of a punch press sold it to a Michigan manufacturer after which the press was subsequently taken by Tennessee by the Michigan manufactur-

er's successor. It was held that the manufacturer of the punch press was subject to process in the Tennessee courts for injury which occurred in that state.

In *Dunnigan vs. A. H. Robins Company,* 559 P.2d 750 (Idaho 1977), an intra-uterine device, known as the Dalkon Shield, was inserted into plaintiff who lived in California, and who subsequently moved to Idaho, where infection and a tubal abscess developed, requiring surgical removal of her fallopian tubes, as a result of the defective design and manufacture, etc., of the Dalkon Shield. It was there held that the single "tortious act" was committed within Idaho, and the Court retained jurisdiction.

In *Phillips vs. Anchor Hocking Glass Corporation,* 413 P.2d 732, (Ariz 1966), annotated at 19 A.L.R.3d 1, PRODUCTS LIABILITY: IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER OR SELLER UNDER "LONG-ARM" STATUTES, the Arizona Court held that it had jurisdiction over an Ohio corporation who had manufactured a dish which caused injury in Arizona. No allegation was made that the dish was purchased in Arizona, or that the defendant was doing business in Arizona at the time of the purchase, the time of the injury, or when the complaint was filed.

The Arizona Court, for injury sustained while using the dish in Arizona, allowed personal jurisdiction to be acquired by the Arizona Court over a nonresident defendant who had "caused an event to occur in this State out of which the claim which is the subject of the complaint arose." This statute, the Court stated, was intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States, and held that it met the "minimum contacts," and "fairness" test of *International Shoe Company vs. State of Washington,* 326 U.S. 310, and *McGee vs. International Life Insurance Company,* 355 U.S. 220.

The Court, in the *Phillips* case, pointed out that the important trend in our notions of fairness has been a shift from emphasizing what is fair to the defendant, to a consideration what is fair to both parties. The Court went on to state as follows:

> "It has been said that fair play and substantial justice are satisfied if (1) the cause of action involves local contacts which make it reasonably desirable from plaintiff's point of view that the case be tried at the selected forum, (2) the defendant has sufficient causal responsibility for the presence of the local contacts in the forum state to permit us to conclude that he has by his own volition subjected himself to answering for them there, and (3) relevant public interests are served, or not disserved, by allowing the cause to be determined at that forum. Leflar, The Converging Limits of State Jurisdictional Powers, 9 Journal of Public Law 282.

The Court, in the *Phillips* case, in criticizing *Hanson vs. Denckla,* infra; wherein, the Supreme Court, in the *Hanson* case, had stated that the defendant must "purposefully" avail himself of the privilege of conducting activities within the forum State, noted that this language had given many state courts much confusion and observed that to construe it literally would be to revitalize the "implied consent" theory which was emasculated by the *International Shoe* case and to reverse the trend expanding state jurisdiction over nonresidents which trend was recognized in the *Hanson* decision. The Court pointed out that to make the requirement of "purposeful activity" within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction over the defendant.

The Arizona Court went on to note that tortious and

negligent acts are obvious examples in which it is unrealistic to say that the actors first considered the laws of the state in which such acts were committed. The Court stated:

> "A rule limiting jurisdiction to defendants who "purposefully" conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state." Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions, 63 Mich.L.R. 1028.

The Arizona Court further noted that Professor Cleary, in his article "The Length of the Long-Arm," 9 Journal of Public Law 293, concluded that state courts hold that the commission of a tort within the territory of the forum, or sustaining injury within the territory of the forum from a tort committed elsewhere, is a sufficient contact upon which to base jurisdiction over the defendant as regards that tort.

In pointing out that the "purposeful activity" language of *Hanson* is deemed by some courts to be met if the event is foreseeable, the Court concluded that the requirements of fair play does not require that the event be forseeable, pointing out that a manufacturer's primary interest is the consumption of his product and not where it is consumed, and that he should be held liable for damage caused by his product, whether suit is brought in his state or in the plaintiffs state.

Fortunately, Justice Stevens notions of "fair notice" put forth in his concurring opinion in *Shaffer vs. Heitner,* 433 U.S. 186, provides a basis for understanding the requirement of purposeful activity as one that protects against unfair surprise, and Justice Marshall's opinions in both *Shaffer vs. Heitner,* and *Kulko* lend support to that interpretation.

In the *Shaffer* opinion, Mr. Justice Marshall dealt with the *Hanson vs. Denckla* test of "purposeful activity" in terms of a "reasonable anticipation of litigation in the forum state." In the *Kulko* opinion, Mr. Justice Marshall again invoked the same *Shaffer* language to make the point more forcefully as follows:

> "This single act is surely not one that a reasonable parent would expert to result in the substantial financial burden and personal strain of litigating a child support suit in a forum three thousand miles away, and we therefore see no basis on which it can be said that appellant could *reasonably have anticipated being* "hailed before a California Court." *Shaffer vs. Heitner.* (Emphasis ours)

It can thus be seen that in *Shaffer,* Mr. Justice Marshall opened the door for clarification of the *Hanson* test by speaking in several instances about the expectations and reasonable anticipations of the defendant. One year later in *Kulko,* he made the transition clear by adopting the standard that simply requires that the defendant could reasonably anticipate litigation in the distant form.

Mr. Justice Marshall's "reasonable anticipation" standard is fully consistent with Mr. Justice Stevens' notion of "fair notice" and reflects a retraction of whatever element of cognitive intent may have been inferred from the *Hanson* language.

It can thus be seen that the question now becomes one as to whether the New York seller could reasonably anticipate being "hailed before an Oklahoma Court." We suggest that he could for the reasons stated in the Supreme Court of Oklahoma's opinion.

It is interesting to note that the courts have not distinguished between a manufacturer and a distributor, or seller of a product. Restatement of Torts (Second) Section

402(a) speaks of "sellers" and does not distinguish between the remote manufacturer, distributor, processor, or seller. Oklahoma has held that the term manufacturer includes manufacture, processor, distributor, and sellers. *Fields vs. Volkswagen,* 555 P.2d 48 (Okl. 1976), and *Gray vs. American Radiator and Standard Sanitary Corporation,* 176 N.E.2d 761 (Ill 1961).

In *Gray vs. American Radiator and Standard Sanitary Corporation,* 176 N.E.2d 761 (Ill 1961), the defendant challenged the jurisdiction where he had manufactured a safety valve which he sold outside his jurisdiction to a radiator manufacturer who incorporated it in his product. The radiator was in the forum state when it exploded injuring the plaintiff. The Illinois Court held that since the injury occurred in that state, the statute was satisfied, the defendant was subject to jurisdiction over his person, even though this was only a single tortious act occurring within the forum, and that it met the "minimum contacts" requirement of *International Shoe* and satisfied traditional notions of fair play.

The cases of *Ajax Realty Corporation vs. J. F. Zook, Inc.,* 493 F.2d 818, (4th Cir. 1972), cert den 411 U.S. 966, 36 L.Ed.2d 687, 93 S.Ct. 2148, and *Golden Gate Hop Ranch, Inc. vs. Velsicol Chemical Corporation,* 403 P.2d 351, cert den 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 539, previously cited are, of course, cases holding that where injury arises in a forum state from the use of a defective product because of the act or ommission occurring outside the state the Court may properly exercise jurisdiction.

In *Rosenblatt vs. American Cyanamid Company,* 86 S.Ct. 1, (1965) Justice Goldberg concluded that the logic of the Supreme Court's decision, in *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95, and *McGee vs. International Life Insurance Company,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.

2d 223, supports the validity of "long-arm statutes" which, like the New York statute involved, based in personam jurisdiction upon commission of a "tortious act" in the forum state. Justice Goldberg there stated:

> "In cases under these statutes in state and federal courts jurisdiction on the basis of a single tort has been uniformly upheld." *Smyth vs. Twin State Improvement Corporation,* 80 A.2d 664, 25 A.L.R.2d 1193; *Painter vs. Home Finance Company,* 96 S.E.2d 731; and *Hutchinson vs. Body & Sons Press Sales, Inc.,* 188 F.Supp. 876 (D.C.D.Mindd. 1960).

Justice Goldberg quoted from an article by Professor Currie, as follows:

> "Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on 'consent' but on the interest of the forum State and the fairness of trial there to the defendant." Currie, The Growth of the Long Arm, 1963 U.Ill.Law Forum 515, 540.

In the following product liability cases, included in an annotation in 19 A.L.R.3d 13, PRODUCTS LIABILITY: IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER OR SELLER UNDER "LONG-ARM" STATUTE, it has been held, expressly or by implication, that the presence of a product in the state of the forum and injury resulting in that state may be a sufficient "contact" satisfying due process. *Harford vs. Smith,* (119 66 D.C.W.Va), 257 F.Supp. 578; *Anderson vs. National Presto Industries, Inc.,* 135 N.W.2d 639 (Iowa 1965); *Atkins vs. Jones and Laughlin Steel Corpor-*

ation, 104 N.W.2d 888 (Minn 1960); and *Metal Matic, Inc. vs. Eighth Judicial District Court,* 415 P.2d 617 (Nev 1966).

The Colorado Court has also held in the case of *Texair Fliers, Inc. vs. District Court, First Judicial District,* 506 P.2d 367 (Col), that where an aircraft owners conduct in failing to inspect an aircraft and in failing to determine the proficiency of the pilot occurred in a foreign state, which negligent acts thereafter resulted in a crash in Colorado, the aircraft owner could be subjected to the long-arm jurisdiction of the Colorado Court and held that the commission of a single tort within the state without any additional "minimum contacts" would give the Colorado courts jurisdiction.

The New York courts, in the case of *Gonzales vs. Harris Calorific Company,* 64 Misc.2d 287, 315 N.Y. Supp.2d 51, aff'd 35 App.Div.2d 720, 315 N.Y.Supp.2d 815, held that where the plaintiff was injured when an oxygen pressure regulator and high pressure gauge of welding equipment exploded and injured him in New York, the foreign sellers and manufacturer were subject to the jurisdiction of the New York courts where this equipment had been manufactured by an Ohio corporation, sold to a New Jersey corporation which in turn sold it to another New Jersey corporation, who then sold it to its New York affiliate where it was sold to plaintiff's employer prior to the time that plaintiff used and was injured by the product.

We respectfully submit to the Court that the only "contact" that the State of New York has with this case, other than the residence of the petitioning defendants, is that the Audi automobile was sold in New York.

The Oklahoma Court was clearly within the limits of due process in exercising In Personam Jurisdiction over the Defendants under the holdings of this Court.

The Supreme Court of Oklahoma, has, as has the Court in *Reilly vs. Phil Tolkan Pontiac, Inc.,* supra, repeatedly held that the Oklahoma Long-Arm Statute was intended to and does extend jurisdiction of the Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the Federal Constitution, and is to be construed to widen constitutional bases upon which the Court of Oklahoma may exercise in personam jurisdiction consistent with due process. *Fields vs. Volkswagen of America, Inc.,* 555 P.2d 48 (Okl 1976), 84 A.L.R.3d 1199; *Carmack vs. Chemical Bank New York Trust Company,* 536 P.2d 895, (Okl 1975); and *Hines vs. Clendenning,* 465 P.2d 460 (Okl 1970).

The Supreme Court of Oklahoma was fully conscious of the constitutional limits of due process and exceedingly cautious in the exercise of personal jurisdiction over the petitioners through service under the Uniform Interstate and International Procedure Act. 12 O.S. (1971), Section 1701.01, et seq. and commonly referred to as the Oklahoma Long-Arm Statute.

This Court will give great weight to the determination and findings of the Supreme Court of Oklahoma, that:

> "In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma.

This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State.

"Because the trial court was justified in concluding that the petitioners derived substantial revenue from goods used within the State, and because alleged acts or omissions on the part of petitioners outside the State allegedly caused tortious injury in this State, we hold that the trial court had the power, pursuant to 12 O.S. 1971, § 1701.03(a)(4), to exercise personal jurisdiction over the petitioners. As the trial court had such power, we refuse to issue a writ of prohibition.

The findings and the determination of the Supreme Court of Oklahoma, we respectfully submit, is fully consistent with the prior rulings of this Court and comply with the requirements of due process under the Fourteenth Amendment of the Constitution of the United States.

We call the Court's attention to the fact that in the trial court, the District Court of Creek County, Oklahoma, in the case of each of the plaintiffs who were injured in the accident involving the Audi automobile, not only World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., were named as defendants, but their sister and affiliated corporations, all with subsidiaries that are largely controlled by Volkswagen Aktiengesellschaft were joined as party defendants. Each of the cases named Audi NSU Auto Union Aktiengesellschaft, Volkswagen of America, Inc., World-Wide Volkswagen Corporation, and Seaway Volkswagen, Inc., as party defendants.

B. THE EXERCISE OF JURISDICTION BY OKLAHOMA COURTS MEETS THE TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

Among the principal factors that commonly arise in considering the fairness factors are the (1) relative aggressiveness of the parties;[1] (2) the relative economic burden of prosecuting or defending the action;[2] (3) the importance of the governmental interest to be vendicated;[3] (4) the convenience of the forum from a litigational efficiency point of view;[4] (5) the necessity of litigation in the chosen forum;[5] (6) the availability of alternative forums;[6] (7) alternative methods for resolving the dispute;[7] (8) the impact of the forum's choice of law doctrine.[8] Professor W. Woods' "Pennoyer's Demise," 20 Ariz.L.Rev. 1601.

In considering the "fairness factors", as it applies to our case, it can be seen that both defendants seek customers for their highly mobile product and can thus reasonably anticipate the possibility of liability producing events anywhere in the country.

In particular, World-Wide Volkswagen Corporation proclaims that knowledge in it's corporate name. *Clay vs. Sun Insurance Company*, 376 U.S. 179 ("World Wide" floater policy anticipates loss anywhere.) Although Oklahoma is not one of the states in which it does business, they are, nevertheless, fully prepared for multi-state litiga-

[1] *Pegler vs. Sullivan*, 432 P.2d 593 (Ariz 1967), and R. Cramton, D. Curie, and H. Kay, *Conflict of Laws*, 556 (2d Ed 1975)

[2] *McGee vs. International Life Insurance Company*, 355 U.S. 220, and *Phillips vs. Anchor Hocking Glass Corporation*, 413 P.2d 732 (Ariz 1966)

[3] *McGee vs. International Life Insurance Company*, 355 U.S. 220; *Mulane vs. Central Hanover Bank & Trust Company*, 339 U.S. 306; and *Fisher Governor vs. Superior Court*, 347 P.2d 1 (Cal 1959).

[4] See footnote 3.

[5] *Mulane vs. Central Hanover Bank & Trust Company*, 339 U.S. 306

[6] *Buckeye Boiler Company vs. Superior Court*, 458 P.2d 57 (Cal 1969)

[7] *Kulko vs. Superior Court*, 436 U.S. 84 (1978)

[8] *Buckeye Builder Company vs. Superior Court*, 458 P.2d 57 (Cal 1969) *and Gray vs. American Radiator & Standard Sanitary Corporation*, 176 N.E.2d 761 (Ill 1961)

tion in products liability cases. There is no rational basis for a principaled distinction between the defendant's business region and Oklahoma, other than the name of the state and distance. In this regard, the problems associated with travelling from New York City to Norwich or Messena, N.Y. are not substantially different from travelling from New York to Oklahoma. Out of town accomodations, the transportation for witnesses, and other difficulties associated with litigation in the distant forum are the same in either Tulsa or Messena. The difference is only an hour or so of flying time and a few hundred dollars.

As for the relative economic burdens, they clearly weigh heavily in favor of the plaintiffs. The defendants are undoubtedly insured and even if not, their ability to internalize the cost of the litigation is much greater than the plaintiffs. There exists the substantial cost of transporting the plaintiffs' witnesses and evidence to New York, since the bulk of the medical witnesses and evidence concerning the accident itself is located in Oklahoma. While the cost of litigation in New York may not prohibitive, it would, nonetheless, impose a much more substantial burden upon the plaintiffs than litigation in Oklahoma would impose upon the defendants and their insurers.

A factor that looms large in the case at hand is the fact that the remaining defendants, namely the manufacturer and the distributor, have submitted to the jurisdiction of the Oklahoma Court, and the trial as to them will go forward. If the distributor and dealer defendants are removed from the case, the litigation will be completed and have to be duplicated in New York. Additionally, the plaintiffs will be deprived of any tactical advantage which comes from having all of the defendants in litigation at one time. It should be noted that the Volkswagen dealer defendant undertakes to provide service on a national basis. It is a member of a highly integrated service sales structure, *Crose vs. Volkswagenwerk Aktiengesellschaft,* 558 P.2d 764 (1977), and can anticipate customers from anywhere in the United States. It too should anticipate litigation involving the law of any forum in which an accident may occur.

If jurisdiction is not maintained in the Oklahoma Court, New York would be the only other available forum, since the possibility of litigation in Arizona would seem slight in view of the decision of the Arizona Court in *Houghton vs. Piper Aircraft Corporation,* 542 P.2d 24 (Ariz 1975). Unlike *Kulko,* there is no alternative forum or alternative methods, such as the Uniform Reciprocal Support Act which is fair to both the plaintiffs and defendants. Oklahoma is a fair accommodation of all interests.

There are no choice of law factors which has any bearing upon this case. The strict liability rules in both New York and Oklahoma are practically the same. Thus, there can be no unfair surprise of the magnitude involved in *Hanson vs. Denckla.* Certainly, the plaintiffs were not forum shopping.

Under the existing circumstances and in view of the efficiency of litigation in Oklahoma, and the apparent financial resources of the defendants, the assertion of jurisdiction by Oklahoma seems to meet the "fairness factors."

The defendants have cited the language of Judge Sobeloff in the case of *Urlinger Mills, Inc. vs. Cohoes Fiber Mills, Inc.,* 239 F.2d 502 (4th Cir 1956); however, we are not here concerned with a dealer defendant who is a small filling station owner in a remote California village, but rather with a large enterprise dealing in a multi-state market, who can reasonably anticipate litigation in a broad array of distant forums because of the inherent mobility of their product. It is suggested that the assertion of jurisdiction over these defendants should be decided by a frank

and open weighing of the fairness of asserting jurisdiction in the particular case at hand and not by application of preemptive rules. The convenience of trial in Oklahoma, the fact that the trial will continue in regard to the national and international defendants in Oklahoma, the lack of an alternative forum that is convenient to the plaintiffs, the relative economic conditions of the parties, and the absence of any countervailing fairness consideration from the defendants point of view all point towards upholding Oklahoma jurisdiction. Professor W. Woods' "Pennoyer's Demise," 20 Ariz.L.Rev. 1601.

The problems associated with asserted jurisdiction over a small local dealer, as dealt with by Judge Sobeloff in the *Urlinger Mills* case are obviously real. However, the argument cuts both ways since to require a purchaser of a small article to return three thousand miles to the place of purchase may impose the same hardships as the defendant would experience in defending the action in the home state of the purchaser. This argument should not form the basis for a decision of the jurisdictional issues, but the Court should consider the fairness factors in determining where jurisdiction should be exercised in product liability cases.

C. THE OKLAHOMA COURT IS THE MOST CONVENIENT FORUM FOR THE TRIAL OF THIS ACTION.

The convenience of the parties has been recognized as an element to be considered in considering the "fairness" test in *Hanson vs. Denckla,* 78 S.Ct. 1228, as well as *McGee vs. International Life Insurance Company,* 355 U.S. 220, and *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154. That the convenience of the parties, while not a substitute for jurisdiction, is a factor to be considered was also recognized by the Arizona Court in the *Phillips vs. Anchor Hocking Glass Corporation case,* infra, where the Court pointed

out that the immobility of our lower economic class is well known, and that the Court should consider the nature of the cause of action, including the applicable law and the practical matters of trial.

In this case (1) the accident occurred in Oklahoma; (2) the injuries were sustained in Oklahoma; (3) the law of Oklahoma would be applied to this case; (4) the witnesses to the accident, giving rise to plaintiffs' injuries, are in Oklahoma; (5) the hospital records and the treating physicians are in Oklahoma; and (6) the plaintiffs, at the time the suit was filed, was confined in the hospital in Oklahoma. If the case were tried in New York, against these defendants, all the witnesses, records, and exhibits would have to be taken to New York.

The trial of the action against the manufacturer and importer would still be in Oklahoma since they have not joined these defendants in challenging the jurisdiction of the Oklahoma courts.

Certainly, Oklahoma is the most convenient place to try this lawsuit. Six major airlines serve Tulsa, Oklahoma, and the only real connection that the State of New York has with this case is the fact that the car was sold there.

This is a case of extreme importance and great magnitude to the plaintiffs. This accident has been a most terrible tragedy to the family. Medical cost has pauperized the Robinsons. They cannot and they should not be forced to assume this extraordinary burden.

We respectfully submit the trial of the action against the manufacturer, Audi NSU Auto Union Aktiengesellschaft, and as against the importer, Volkswagen of America, Inc., would still be held in Oklahoma, since those defendants joined issue and admitted the jurisdiction of the Oklahoma Court. They have refused to join with petitioners in petitioners' Application for Writ of Certiorari.

They had refused and did not join with these petitioners in the Application for a Writ of Prohibition to the Supreme Court of Oklahoma.

The trial of this action, in the opinion of counsel, may well exceed three or four weeks; the record will be voluminous and the costs staggering.

D. THIS MATTER IS MOOT BECAUSE THE DEFENDANTS HAVE ENTERED A GENERAL APPEARANCE.

The defendant, World-Wide Volkswagen Corporation, in a pleading entitled SPECIAL APPEARANCE, DENIAL OF JURISDICTION AND VENUE, challenged the jurisdiction of the Oklahoma Trial Court not only over the person of the defendant, but jurisdiction of the *subject matter* as well, and further asked for dismissal of the action because of lack of the Court's jurisdiction over the *subject matter.* (Appendix, p.25)

While the authorities are split on whether this would constitute a general appearance, 5 Am.Jur.2d, *Appearance,* Section 21, page 496, Oklahoma has clearly ruled that challenging the jurisdiction of the Trial Court over the subject matter does constitute a general appearance. *Webster vs. Crump,* 246 P. 423 (Okl 1926); *Jameson vs. Harvel,* 280 P. 1080 (Okl 1929), and *Severson vs. Home Owners Loan Corporation,* 88 P.2d 344 (Okl 1939).

In an annotation, OBJECTION BEFORE JUDGMENT TO JURISDICTION OF COURT OVER SUBJECT MATTER AS CONSTITUTING GENERAL APPEARANCE, appearing at 25 A.L.R.2d 833, the authors have listed the majority jurisdictions where this rule is followed.

Both defendants, World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., have participated in the taking of plaintiffs' depositions on other than jurisdictional grounds in which they inquired at great length about the liability issues and the plaintiffs' damages involved in the action. Although they attempted to make these inquiries without prejudicing themselves by stating that they were not waiving any of their rights in doing so, this was not pursuant to any stipulation or agreement of counsel. By participating in the taking of depositions on non-jurisdictional issues, both defendants entered a general appearance. 5 Am.Jur.2d, *Appearance,* Section 21, page 497, and *Ada Dairy Products vs. Superior Court of Seminole County,* 258 P.2d 939 (Okl 1953).

A real and substantial federal question is essential to the jurisdiction of the U.S. Supreme Court over judgments of state courts. The federal question cannot be one that is moot. *Kimball vs. Kimball,* 174 U.S. 158, 43 L.Ed. 932, 19 S.Ct. 639, *Little vs. Bowers,* 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620. 32 Am.Jur.2d, Federal Practice and Procedure § 252, P. 720.

CONCLUSION

In virtually every case presented to this Court, from *McGee* to *Ajax Realty vs. Zook,* (cert den), defendants have insisted upon a return to the doctrine of *Pennoyer vs. Neff.* The charge is leveled that the application of the long-arm statute involved to the defendants in the particular case, extends the State Court jurisdiction beyond the constitutional limit and removes all bearers from exercising in personam jurisdiction in any case. This Court has readily rejected such argument and has consistently refused to return to *Pennoyer.*

The test is not that automobile dealers may be subjected to suit in particular cases, the test that this Court has established is does it offend "traditional notions of fair play and substantial justice."

This Court, some 25 years ago, discerned a trend toward expanding the prospective scope of state jurisdiction under foreign corporations and other nonresidents. This, the Court said, was attributable to a fundamental transformation on the American national economy under the years.

With the enormous increase of nationalized communications, interstate commerce transportation; with the enormous mobility of the American citizen, with some 400 million automobiles traveling transcontinental highways, it is well that the Court recognize that where dangerous and defective products are placed in the hands of innocent purchasers, there is in fact a greater responsibility which the manufacturer and seller of such an instrument must recognize.

It is a matter almost as simple as this. Either an unbearable burden must be placed upon the plaintiffs, or the defendant seller must recognize its responsibility.

Because the defendants have entered a general appearance and the case is now moot, and because the Oklahoma Court is the only forum which meets the "traditional notions of fair play and substantial justice" in this case, and because the exercise of in personam jurisdiction of the Oklahoma Court is clearly within the perimeter of due process, the jurisdiction of the Oklahoma Court should be sustained.

Respectfully Submitted,

Jefferson G. Greer
206 Beacon Building
Tulsa, Oklahoma 74103

Charles A. Whitebook
1700 Fourth NBT Building
Tulsa, Oklahoma 74119

Of Counsel:
Greer & Greer
206 Beacon Building
Tulsa, Oklahoma 74103

Supreme Court, U. S.
FILED
SEP 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF FOR PETITIONERS

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen Corporation
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

DAN A. ROGERS
Attorney for Petitioner
Seaway Volkswagen, Inc.
117 East 5th Street
Tulsa, Oklahoma 74103

Of Counsel:

HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103

ROGERS, ROGERS & JONES
117 East 5th Street
Tulsa, Oklahoma 74103

HERZFELD & RUBIN, P.C.
HERBERT RUBIN
BERNARD J. WALD
IAN CERESNEY
HOWARD S. EDINBURGH
40 Wall Street
New York, New York 10005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1078

WORLD-WIDE VOLKSWAGEN CORPORATION and SEAWAY VOLKSWAGEN, INC.,

Petitioners,

v.

THE HONORABLE CHARLES S. WOODSON, District Judge of Creek County, State of Oklahoma, KAY ELOISE ROBINSON, EVA MAY ROBINSON, a minor, by and through her father and next friend, HARRY ROBINSON, GEORGE SAMUEL ROBINSON, a minor, by and through his father and next friend, HARRY ROBINSON, and HARRY ROBINSON, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF FOR PETITIONERS

I

Respondents' arguments are in conflict with the controlling decisions of this Court.

Respondents in their brief ask nothing less than that this Court forsake the jurisdictional standards of *International Shoe, Hanson* v. *Denckla, Shaffer* and *Kulko.* They pass lightly over the "minimum contacts" requirement and directly challenge the necessity of "purposeful activity" under these decisions. While this Court has is-

sued repeated reaffirmations of *Hanson* v. *Denckla* by citation and quotation in both *Shaffer* and *Kulko*, respondents unabashedly attack the principles enunciated by the Court in that case. (R.Br. pp. 9-10).*

Kulko flatly lays down two threshold requirements before the Fourteenth Amendment Due Process Clause will permit personal jurisdiction over a nonresident: There must be both reasonable notice and also "a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum." 436 U.S. at 91. The inquiry is not, as respondents suggest, simply one of "fairness." The mandate is that a "sufficient connection" must first be found. Not every connection will suffice. If the connection is attenuated, if it amounts to less than "minimum contacts," or if it is not accompanied by "purposeful activity," a state court operating within a federal system may not assume jurisdiction.

That "minimum contacts" and "purposeful activity" are essential requirements in every case is reiterated time and again in the decisions of this Court. In *Kulko* the Court cites and quotes the "minimum contacts" language of *International Shoe* at 436 U.S. at 92. At pages 93 and 94 it quotes at length and with approval the "purposeful activity" language of *Hanson* v. *Denckla*. It expressly notes that the unilateral activities of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum state. In *Kulko* it is pointed out that the mere fact that the former wife elected to move to California is no reason to subject the former husband to suit there, even if he

* References in parentheses preceded by R.Br. are to the Brief of Respondents.

had incidental attenuated contacts with California by reason of his sending or permitting the children to live there. Similarly, the fact that respondents in this case chose to take their vehicle to Oklahoma, even if travel to Oklahoma may have been conceivable to petitioners, is too remote and attenuated to meet the "minimum contacts" test and makes no pretense of complying with the "purposeful activity" test.*

* The Court, in the body of its opinion in *Kulko*, cites *Hanson* v. *Denckla* no less than five times. The statements made by the Court in *Kulko* with respect to *Hanson* v. *Denckla* can just as easily be made in this case:

> "Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. *Hanson* v. *Denckla*, 357 U.S. 235, 246 (1958).
>
> • • •
>
> "As we have emphasized:
>
> > 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State. . . .' *Hanson* v. *Denckla*, *supra*, 357 U.S. at 253.
>
> • • •
>
> "As in *Hanson* v. *Denckla*, 357 U.S., at 252, the instant action involves an agreement that was entered into with virtually no connection with the forum State.
>
> • • •
>
> "[T]he fact that [the forum State] may be the 'center of gravity' for choice-of-law purposes does not mean that [the forum State] has personal jurisdiction over the defendant. *Hanson* v. *Denckla*, supra, at 254.
>
> • • •
>
> "We therefore believe that the state courts in the instant case failed to heed our admonition that 'the flexible standard of *International Shoe*' does not 'heral[d] the eventual demise of all restrictions on the personal jurisdiction of state courts.' *Hanson* v. *Denckla*, 357 U.S., at 251." *Kulko* v. *Superior Court*, 436 U.S. 92, 93-94, 97, 98, 101 (1978).

The Court in *Shaffer*, 433 U.S. at 215, quotes at length the *Hanson* v. *Denckla* language which disavows the "center of gravity" as a basis for jurisdiction, and emphasizes that "the issue is personal jurisdiction, not choice of law. It is resolved by considering the acts of appellants." That language is again quoted in *Kulko*. 436 U.S. at 98. It is difficult to conceive how much more clearly this Court could have articulated the point that abstract arguments of fairness or convenience, such as those offered by respondents, cannot be considered without first finding minimum contacts and purposeful activity directed to the forum. As *Kulko* points out at page 100, the fact that a forum may have "substantial interests" in the subject matter and in some of the parties is insufficient to make it a "fair forum." Thus, even if it may be argued that the accident in Oklahoma makes Oklahoma the center of gravity, an Oklahoma center of gravity cannot overcome an absence of minimum contacts or of purposeful activity.

The pointed admonition of *Hanson* v. *Denckla*, reaffirmed in *Kulko* (436 U.S. at 101), is entirely relevant here:

> "[T]he flexible standard of *International Shoe* does not herald the eventual demise of all restrictions on the personal jurisdiction of state courts."

Absent minimum contacts and purposeful activity of petitioners in Oklahoma, there can be no Oklahoma jurisdiction.

II

There is a total absence of minimum contacts and of purposeful activity in this case.

Respondents, in effect, concede an absence of minimum contacts. The furthest reach of any contact asserted by them appears in their brief at page 7. Having failed to

show petitioners' minimum contacts even through "marketing channels," respondents argue "it is only a short step in logic" to find such contacts "when the customer himself" in the possession of a mobile product "brings the product into the forum state himself." But the rationale of the decisions of this Court, articulated most recently in *Kulko*, is precisely to the contrary. Particularly telling in *Kulko* is the Court's repetition of the *Hanson* v. *Denckla* quotation (436 U.S. at 93) regarding "the unilateral activity" of a plaintiff as a basis for jurisdiction.

The record is clear. In this case there is not even the remotest activity by Seaway and World-Wide directed to the exploitation of the Oklahoma market. They "had no reason to expect to be haled before an [Oklahoma] court." *Shaffer* v. *Heitner*, 433 U.S. at 216; *Kulko* v. *Superior Court*, 436 U.S. at 97-98.

III

The cases cited by respondents are either constitutionally defective or are irrelevant.

Respondents' exhaustive survey of federal and state "long-arm" decisions since *International Shoe* has produced only one isolated case, *Reilly* v. *Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1250 (D.N.J. 1974), in which a court exercised jurisdiction over a nonresident retailer solely upon the ground that the retailer should have foreseen his product being taken by his customer into a distant forum. It is submitted that the *Reilly* case, to the extent it is consistent with the present decision of the Oklahoma court, places an unconstitutional burden on local sellers of consumer goods.

In each case cited by respondents, other than *Reilly*, there is a colorable showing that the manufacturer de-

fendant had undertaken some purposeful activity in the forum state or had derived economic benefits from his products being sold in the forum or to its residents. In none of these cases was the mere happenstance of the accident in the forum—the circumstance now before this Court —sufficient to sustain jurisdiction.

That there are jurisdictionally cognizable differences between sellers of goods at different levels is indisputable. A multi-billion dollar manufacturer engaged in national distribution is vastly different from the single owner business which sells the manufacturer's products to local customers in a single community of a single state. "[A] given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." *Shaffer* v. *Heitner,* 433 U.S. at 186, 204 n. 19. Even respondents (R.Br. p. 19) recognize that different defendants may require different treatment. What they fail to recognize, however, is that the difference in treatment does not arise because of some undefined difference in size or ability to litigate at a distance from home. The critical distinction between a national distributor and a local seller is that the marketing plan of the national distributor may be of such a character as to permit a finding of purposeful activity directed toward the forum state, resulting in the requisite minimum contact with that state. No such purposeful act or minimum contact appears in this case. The constitutional prerequisites for jurisdiction are thus absent.

CONCLUSION

For all the reasons set forth, petitioners request that this Court reverse the Oklahoma Supreme Court's denial of a writ of prohibition and direct that the writ be issued, prohibiting the respondent trial judge from exercising personal jurisdiction over petitioners.

Respectfully submitted,

MIKE BARKLEY
Attorney for Petitioner
World-Wide Volkswagen Corporation

DAN A. ROGERS
Attorneys for Petitioner
Seaway Volkswagen, Inc.

Of Counsel:

HALL, ESTILL, HARDWICK,
GABLE, COLLINGSWORTH
& NELSON

ROGERS, ROGERS & JONES

HERZFELD & RUBIN, P.C.
HERBERT RUBIN
BERNARD J. WALD
IAN CERESNEY
HOWARD S. EDINBURGH